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Stuart Biegel

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The "Safe Schools" Provision: Can a Nebulous Constitutional Right Be a Vehicle for Change?

by STUART BIEGEL*

Introduction

At first glance, one might wonder why the "Safe Schools" Provision of the California Constitution, article I, section 28(c), would generate any controversy at all. It provides:

RIGHT TO SAFE SCHOOLS. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.¹

Certainly this new right, added to the constitution when Proposition 8 was approved by the electorate in 1982,² is something that all of us can support. After all, every reasonable person wants safe schools. Every reasonable person wants young people to be able to attend campuses that are free from crime, violence, and drug abuse. Every reasonable person agrees that safer schools will lead to better education and a higher quality of life for all people.

Yet, despite this apparent agreement, the new constitutional provision has triggered an increasingly volatile legal battle, fueled by proponents of Proposition 8 who are arguing in both the media and the courts for additional school district duties and increased liability for injuries on

* Mr. Biegel, a member of the California Bar, is currently a Lecturer in Education Law, Curricular Policy, and Directed Field Studies at the UCLA Graduate School of Education, and an administrator in charge of the university's teacher training program at junior and senior high schools in the Los Angeles area. A former classroom teacher specializing in gifted education, he has also directed summer job programs for economically disadvantaged youth. The author would like to acknowledge the invaluable assistance and support of Professor Michael R. Asimow (UCLA School of Law), California Attorneys Elena B. Bazes and Eric D. Berkowitz, and Professor Marilyn Kourilsky (UCLA Graduate School of Education).

1. CAL. CONST. art. I, § 28(c).

2. Known from the beginning as the "Victims' Bill of Rights," this highly publicized initiative was designed to effect changes in the rights of victims and the laws relating to truth-in-evidence, bail, and the use of prior convictions in criminal proceedings. See generally CAL. CONST. art. I, § 28.

school grounds.³ The public schools, already beset with a multitude of complicated and wide-ranging problems,⁴ are now faced with the implications of the recent trial court decision in *Hosemann v. Oakland Unified School District*.⁵

Stephen Hosemann was physically assaulted on his junior high campus by a former schoolmate.⁶ Fearing further attacks, he brought an action against both the Oakland Unified School District and his assailant, Edward Hardy, seeking declaratory relief under article I, section 28(c).⁷ Judge Richard Bartalini, in a sweeping and unusual thirty-eight page decision that is by far the most aggressive position taken to date by the California courts, declared that the Safe Schools Provision not only provides injured plaintiffs with a new cause of action, but mandates an affirmative duty "to make schools safe," no matter what the cost.⁸ Since *Hosemann* brings into focus the controversy over the correct interpretation of subdivision (c), the media quickly proclaimed it a landmark case, one that could go to the Supreme Court for a final determination.⁹

Although statistics abound, no one seems to know just how safe or unsafe the public schools are.¹⁰ Opinions on the subject, however, are not lacking. Attorney Lois DeJulio, for example, who represented the defendant in the landmark school search and seizure case of *New Jersey v. T.L.O.*,¹¹ emphasized that "schools are not the blackboard jungle they

3. See generally *Oakland Schools Get the Word: Fight Campus Crime*, L.A. Times, Dec. 8, 1986, § 1, at 3, col. 3: "At least 30 similar lawsuits, all based on . . . the Victims' Bill of Rights' initiative, are pending throughout the state." (emphasis added).

See also *Court Orders Safe Schools*, 72 A.B.A. J., Sept. 1986, at 30 [hereinafter *Safe Schools*]; Nicholson, Rapp & Carrington, *Campus Safety: A Legal Imperative*, 33 Educ. L. Rep. (West) 981 (1986); Thompson, *Officials Held Liable for Crime in the Schools*, L.A. Daily Journal, May 23, 1986, § 1, at 3, col. 1.

4. See *infra* notes 253-270 and accompanying text.

5. No. 583092-9 (Alameda County Super. Ct., May 12, 1986), *appeal pending*, No. A035856 (1st Dist. Cal. Ct. App.) [hereinafter *Hosemann*].

6. The trial court said only that "Hosemann was trapped and physically assaulted by Hardy." *Id.* at 5. No evidence of any injuries was presented.

7. At the time of the assault, in June 1983, Hardy attended another school in the Oakland district. There has apparently been no direct personal contact between the two young men since then. *Id.* at 5-6.

8. *Id.* at 28-29, 36.

9. See L.A. Times, May 13, 1986, § 1, at 3, col. 4; see also Thompson, *supra* note 3; *Safe Schools*, *supra* note 3.

10. Education Digest reported in April 1986 that "[i]n fact, statistics on school disorder are too vague and disorderly to yield precise information." Brooks, *Are We Evading the Issue of Disorder in the Schools?*, EDUC. DIG., April 1986, at 10. The L.A. Times reported in June 1986 that "there is still little agreement among experts nationwide over whether school violence is worsening in America." *Detroit Officials Grapple with Increase in School Shootings*, L.A. Times, June 6, 1986, § 1, at 16, col. 4.

11. 469 U.S. 325 (1985).

have been painted to be."¹² Judge George Nicholson,¹³ though, who co-authored Proposition 8 along with Paul Gann,¹⁴ declared in 1986 that "statistics . . . are inadequate to convey the magnitude of school safety problems in America."¹⁵

Perhaps the only consensus on this issue is that there *are* schools with serious problems in this regard,¹⁶ and that more can be done to make the situation better. Some people would argue that the Safe Schools Provision is the key to solving these problems.¹⁷

This Article focuses on the possible implications of article I, section 28(c) in light of recent developments. Part I examines the various theories of recovery currently available for injuries on school grounds.¹⁸ Part

12. Stewart, *In the Supreme Court*, 71 A.B.A. J., Feb. 1985, at 51, 54.

13. Judge Nicholson, a recent appointee to the municipal court bench in Sacramento, is a former Senior Assistant Attorney General and was the first director of the National School Safety Center. He has been a tireless proponent of expanded school district duties and liabilities under article I, section 28(c). See, e.g., Nicholson & Carrington, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1 (1984).

14. Mr. Gann is well known in California for his involvement in a series of controversial ballot initiatives, including Proposition 13 (1978), Proposition 4 (1979), Proposition 8 (1982), Proposition 24 (1984), and Proposition 61 (1986). See generally *Promises, Promises: Are Jarvis and Gann as Good as Their Words?*, L.A. Daily Journal, June 27, 1986, § 1, at 4, col. 3.

15. Hanelt, Nicholson & Washburn, *Of Inalienable Rights and Exclusive Remedies*, 30 Educ. L. Rep. (West) 19 (1986). The recent annual report of crimes in the Los Angeles Unified School District is indicative of the contradictory information available on the subject. Although "[r]eports of crimes involving students rose 29% . . . in 1985-86," the district claimed that this figure "was largely the result of an abnormally high level of child-abuse reporting . . . prompted by the publicity surrounding . . . recent cases . . ." *Reported Crimes at Schools Show Rise and Enigma*, L.A. Times, October 23, 1986, § 2, at 1, col. 5.

The 1985-86 statistics offered similar contradictory information on the drug abuse problem. Reports of drug possession or sale *dropped* 12% over the same period, yet "[i]nvestigations by district police indicate that some drug-related activity may have merely shifted from school grounds to off-campus areas." It was further emphasized that these statistics merely reflected reported crimes; no follow-up information was available regarding whether, or to what extent, these reports had been substantiated. *Id.* at 5, col. 1.

Although two major reports on school safety have been released during the 1980's (*Disorder in Our Schools*, the 1984 Bauer Report for the Reagan Administration, and the *Report of the Commission on Safe Schools of the American Federation of Teachers*, 1985), the "last comprehensive, nationwide study of school crime, in all its complex aspects," was published in 1978 (*Violent Schools—Safe Schools*, the U.S. Dept. of Health, Education & Welfare Report). See Hanelt, Nicholson & Washburn, *supra*, at 20.

16. See L.A. Times, *supra* note 10, at 16, col. 4 ("It seems clear that the increased ease with which guns are becoming available to teen-agers has worsened the climate of fear in many inner city schools."); see also Honig & Van de Kamp, *Letter of Introduction*, 11 PEPPERDINE L. REV. (1984) ("[F]ar too many crime victims are public school students and staff.").

17. See generally Sawyer, *The Right to Safe Schools: A Newly Recognized Inalienable Right*, 14 PAC. L.J. 1309 (1983) (an excellent overview of article I, § 28(c) by Ms. Kimberly Sawyer, and an enthusiastic presentation of the case for an affirmative duty to make schools safe); see also Hanelt, Nicholson & Washburn, *supra* note 15.

18. See *infra* notes 21-46 and accompanying text.

II explores five possible interpretations of the Safe Schools Provision.¹⁹ Part III discusses the practical impact of additional duties and increased liability under the Safe Schools Provision.²⁰ The Article concludes that this provision should be narrowly interpreted to avoid imposing obligations on the schools that are inconsistent with current law, violative of public policy, and likely to create even more problems on a practical level for both teachers and administrators.

I. Theories of Recovery for Injuries on School Grounds

Currently, people injured on school grounds can benefit from a large body of case law in the negligence area, statutory obligations in the California Education Code,²¹ the scheme of statutory liability under the California Government Code,²² and the courts' application of various doctrines in both the federal and state constitutions.

When students are injured by fellow students,²³ school districts can

19. See *infra* notes 47-274 and accompanying text. These five interpretations are set forth as follows: (a) The provision is simply a restatement of existing law, because what it says is neither new nor different. See *infra* notes 52-99 and accompanying text. (b) The provision is not self-executing, and therefore represents an invitation to the legislature to come up with a statutory scheme for implementing the provision. See *infra* notes 100-129 and accompanying text. (c) The provision maximizes school safety by making it easier to prosecute those who commit crimes on school grounds. See *infra* notes 130-149 and accompanying text. (d) The provision provides for additional duties and/or remedies under existing tort law doctrines. See *infra* notes 150-205 and accompanying text. (e) The provision mandates an affirmative duty to make schools safe regardless of cost. See *infra* notes 206-274 and accompanying text.

20. See *infra* notes 275-290 and accompanying text.

21. See CAL. EDUC. CODE § 44807 (West 1978).

See generally CAL. EDUC. CODE ch. 4, art. 1, §§ 44000-48424 (Rights and Duties of Certificated Employees); ch. 6, art. 1, §§ 48900-48925 (Pupil Rights and Responsibilities, Suspension or Expulsion); ch. 6, art. 5, §§ 49000-49001 (Pupil Rights and Responsibilities, Prohibition of Corporal Punishment) (West 1980 & Supp. 1987).

22. See generally CAL. GOV'T CODE §§ 800-895.8 (West 1980) (liabilities and immunities under the Tort Claims Act).

23. This analysis focuses on *student* injuries because the great majority of legal disputes in this area (including the key cases of Hosemann, *supra* note 5, Rodriguez v. Inglewood Unified School District, 186 Cal. App. 3d 707, 230 Cal. Rptr. 833 (1986) (hereinafter *Rodriguez II*), and Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984)) involve such injuries. However, since article I, section 28(c) also refers to the rights of public school staff, it must be noted that teachers have their own rights and remedies under negligence law as well. See 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 69 (8th ed. 1973): "In addition to being responsible for [a] known dangerous condition, a school district is *liable for injuries to person or property resulting from negligence* of officers or employees acting within the scope of their employment." (emphasis added). But see Halliman v. Los Angeles Unified School Dist., 163 Cal. App. 3d 46, 209 Cal. Rptr. 175 (1984) (for injuries to teachers, the worker's compensation remedies have generally been deemed exclusive).

generally be found liable not only for their own actions,²⁴ but for the actions of their administrators and teachers, under the doctrine of *respondeat superior*.²⁵ Negligent actions that give rise to liability tend to fall into one of two categories: (1) failing to exercise proper supervision,²⁶ and (2) directing or permitting pupils to engage in conduct which might reasonably be foreseen to result in injuries to others.²⁷

Although the courts usually find districts liable for injuries that occur during school hours and are caused by students enrolled in the particular school, they are less likely to find liability where the perpetrator is not a student and the injury takes place before or after school.²⁸

Courts decide cases in this area on practical grounds, determining whether or not a school could reasonably be expected to prevent the particular injury under all the circumstances of the case.²⁹ Three basic principles are often determinative: (1) school districts are not insurers of pupil safety;³⁰ (2) school personnel cannot supervise all movements and

24. If it can be shown, for example, that a school district policy decision is the actual and proximate cause of an injury on school grounds, the district may be held liable for negligence. A relatively new cause of action, negligent hiring, arguably qualifies as a "school district action" in this regard, although Professor Richard Epstein states that "it may be limited because other forms of liability such as vicarious liability will be available anyway." See M. Silver, *Negligent Hiring Claims Take Off*, 73 A.B.A. J., May, 1987, at 72.

25. See generally *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89, cert. denied, 362 U.S. 968 (1959). See also K. ALEXANDER & M. ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 484 (2d ed. 1985); W. PROSSER & W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 69 (5th ed. 1984).

26. See, e.g., *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970).

27. *Id.* at 748-49, 470 P.2d at 364, 87 Cal. Rptr. at 380. See also *Beck v. San Francisco Unified School Dist.*, 225 Cal. App. 2d 503, 37 Cal. Rptr. 471 (1964); *Ziegler v. Santa Cruz City High School Dist.*, 168 Cal. App. 2d 277, 283, 335 P.2d 709, 712 (1959).

28. See generally *Bartell v. Palos Verdes Peninsula School Dist.*, 83 Cal. App. 3d 492, 147 Cal. Rptr. 898 (1978) (district not liable for injuries occurring while playing a game, at approximately 5:30 p.m., after gaining access to playground "through an unlocked gate or a hole in the fence"); *Rodriguez II*, 186 Cal. App. 3d 707, 230 Cal. Rptr. 823 (1986) (district not liable for injuries caused by non-student assailant on school grounds). But see *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984) (district held liable for injuries caused during school hours, but by unidentified assailant who was arguably a non-student).

29. See *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978); *Perna v. Conejo Valley Unified School Dist.*, 143 Cal. App. 3d 292, 192 Cal. Rptr. 10 (1983).

30. *Rodriguez v. Inglewood Unified School Dist.*, 199 Cal. Rptr. 524, 528 (1984) (official opinion ordered republished by California Supreme Court and case retransferred with instructions to reconsider (see *infra* notes 159-162 and accompanying text)) [hereinafter *Rodriguez I*] ("We find no precedent to require the School District to be guarantors of protection from all harm."); *Bartell*, 83 Cal. App. 3d at 498, 147 Cal. Rptr. at 901 ("School districts and their employees have never been considered insurers of the physical safety of their students.").

activities of pupils;³¹ and (3) schools are expected to take only such preventive action as is practically available to them.³²

California schools are faced with additional legal obligations regarding school safety under Education Code section 44807, which imposes a statutory duty to supervise. Teachers are expected to "hold pupils to a strict account for their conduct,"³³ and both teachers and administrators are allowed to exercise "physical control" over students to the extent that it is "reasonably necessary to maintain order, protect property, or *protect the health and safety of pupils*, or to maintain proper and appropriate conditions conducive to learning."³⁴

Government tort immunity no longer bars injured plaintiffs. If statutory liability can be established under the provisions of the California Government Code,³⁵ a successful cause of action can often be maintained.³⁶ Since all government tort liability must be based on statute,³⁷ an aggrieved party needs to show that the school district acted in violation of at least one statute "designed to protect against the risk of . . .

31. See generally *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 3d 1, 7, 31 Cal. Rptr. 847, 850-51 (1963); *Reithardt v. Board of Educ.*, 43 Cal. App. 2d 629, 111 P.2d 440 (1941).

32. See *Peterson*, 36 Cal. 3d at 805-06, 814, 685 P.2d at 1195-96, 1202, 205 Cal. Rptr. at 844-45, 851; see also *Rodriguez I*, 199 Cal. Rptr. at 528, 529. See generally Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Caused by Acts of Fellow Students*, 36 A.L.R. 3d 330 (1971).

The expanded scope of the special relationship doctrine today arguably provides an injured plaintiff with a more effective vehicle for establishing that defendant school district had a duty to act. See *infra* notes 150-190 and accompanying text.

33. CAL. EDUC. CODE § 44807 (West 1978).

34. *Id.* (emphasis added). The California Supreme Court has indicated that this section codifies the traditional common law doctrine of *in loco parentis*, under which school employees have been allowed greater latitude in their actions because they stand "in the place of the parent." *In re William G.*, 40 Cal. 3d 550, 560, 571, 709 P.2d 1287, 1292-93, 1300-01, 221 Cal. Rptr. 118, 124, 131 (1985). Opinions differ, though, as to the extent of this "greater latitude." The U.S. Supreme Court recently declared that school officials could no longer claim "parental" immunity from the Fourth Amendment based on this doctrine. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985). The California Supreme Court has asserted that "[a]n overemphasis of this doctrine ignores the realities of modern public school education." *In re William G.*, 40 Cal. 3d at 560, 709 P.2d at 1292-93, 221 Cal. Rptr. at 123-24. Justice Mosk, however, cites this code section as proof that the basic doctrine of *in loco parentis* is not dead in California, and argues that the right of school officials to search pupils is implicit in the statutory directive of section 44807. *Id.* at 571-72, 709 P.2d at 1300-01, 221 Cal. Rptr. at 131-32 (Mosk, J., dissenting).

35. CAL. GOV'T CODE §§ 810-895.8 (West 1980).

36. See *Rodriguez II*, 186 Cal. App. 3d at 723, 230 Cal. Rptr. at 833 (describing the "logical sequence of analysis of government tort cases"). See also *Lopez v. Southern California Rapid Transit Dist.*, 40 Cal. 3d 780, 792, 710 P.2d 907, 914, 221 Cal. Rptr. 840, 847 (1985) ("[T]he rule is liability; immunity is the exception").

37. CAL. GOV'T CODE § 815 (West 1980). See also *Lopez*, 40 Cal. 3d at 785 n.2, 709 P.2d at 909 n.2, 221 Cal. Rptr. at 842 n.2.

[that] . . . particular kind of injury”³⁸

*Serrano v. Priest*³⁹ provides yet another legal doctrine to use against the schools in a safety context. Since the court ruled there that education in California is a fundamental right under the state’s own Equal Protection Clause,⁴⁰ a plaintiff could reasonably assert that students’ fundamental rights are being violated when education at a particular school is adversely affected by criminal acts on campus.⁴¹

Finally, recent decisions on fourth amendment rights are filled with strong, unequivocal language regarding the duties and obligations of schools. The California Supreme Court in *In re William G.*⁴² emphasized that “the school premises must be safe and welcoming,” and that “society assumes a duty to protect [students] from dangers posed by anti-social activities.”⁴³ Justice Powell, in *T.L.O.*,⁴⁴ was even more forceful:

Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, *the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent*

38. CAL. GOV’T CODE § 815.6 (West 1980). See also *Tirpak v. Los Angeles Unified School Dist.*, 187 Cal. App. 3d 639, 232 Cal. Rptr 61 (1986).

For this purpose, the word “statute” has been loosely interpreted to include any enactment. See *Rodriguez II*, 186 Cal. App. 3d at 723, 230 Cal. Rptr. at 833 (“Section 815.6 . . . makes a public entity liable for its failure to discharge a mandatory duty imposed by an enactment, be it a constitutional or charter provision, statute, ordinance, or regulation having the force of law.”). Statutes that have been successfully employed to establish school district liability include California Government Code section 835 (dangerous condition of public property) and Education Code section 44807 (duty to supervise). See *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984) (liability imposed); see also *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970). But see *Rodriguez II*, 186 Cal. App. 3d at 723, 230 Cal. Rptr. at 833 (school district held not liable).

39. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), cert. denied, 432 U.S. 407 (1977) [hereinafter *Serrano II*]; see also *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) [hereinafter *Serrano I*].

40. 18 Cal. 3d at 767, 557 P.2d at 1052, 135 Cal. Rptr. at 368.

41. Courts have yet to define the parameters of the fundamental right to an education; *Serrano* itself was decided within the context of school finance only. However, it can be argued that the state’s Equal Protection Clause has been violated when and if it is shown that education for some is better than education for others (either on an individual basis or on a school-wide basis) because of crime, violence and/or drug abuse on school grounds.

42. 40 Cal. 3d 550, 709 P.2d 1287, 221 Cal. Rptr. 118 (1985).

43. 40 Cal. 3d at 563, 709 P.2d at 563, 221 Cal. Rptr. at 126. Interestingly, the California court describes this as society’s obligation, while the U.S. Supreme Court (see *infra* note 45 and accompanying text) specifically refers to the school’s obligation to protect pupils.

44. 469 U.S. 325 (1985).

years has prompted national concern.⁴⁵

Current cases and statutes thus provide school crime victims with a great deal of support and a variety of rights and remedies. Numerous strategies are already available to injured plaintiffs, and the districts cannot help but be aware that the courts will not tolerate half-hearted attempts to maintain orderly public school campuses. Some people, however, continue to believe that this extensive and wide-ranging body of law is not sufficient, and look to article I, section 28(c) as a vehicle for yet another cause of action.⁴⁶ In light of these ongoing developments, the following section examines five possible interpretations of subdivision (c).

II. Possible Interpretations of Article I, Section 28(c)

Although the California Supreme Court upheld the constitutionality of Proposition 8,⁴⁷ no new light was shed on section 28(c)'s application.⁴⁸ Since 1982, the Safe Schools Provision has been mentioned in only one California Supreme Court case, *In re William G.*,⁴⁹ where it was quoted verbatim by Justice Mosk in a dissenting opinion on the application of the new reasonable suspicion standard for school searches and seizures.⁵⁰

Several appellate courts in recent years have considered article I, section 28(c) as a possible "statutory" basis of recovery in cases involving assaults on school campuses. The disposition of this issue has been inconclusive, however, since the cases generally have been decided on other grounds.⁵¹

45. *Id.* at 350 (Powell, J., concurring) (emphasis added). (This passage is also quoted by Justice Mosk in *In re William G.*, 40 Cal. 3d 550, 573, 709 P.2d 1287, 1302, 221 Cal. Rptr. 118, 133 (Mosk, J., dissenting)).

The courts today have recognized that the Fourth Amendment definitely applies to students in the public schools. *See id.* at 557-58, 709 P.2d at 1290-91, 221 Cal. Rptr. at 121-22; *see also* *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969) ("Students do not shed their constitutional rights upon reaching the schoolhouse door.").

Recent cases also emphasize the fact that school officials are "agents of the government" for purposes of the Fourth Amendment. *See e.g.*, *In re William G.*, 40 Cal. 3d at 558-60, 709 P.2d at 1291-92, 221 Cal. Rptr. at 122-23.

46. *See* Sawyer, *supra* note 17; Hanelt, Nicholson & Washburn, *supra* note 15, at 14; Hosemann, *supra* note 5; *see also infra* notes 210-215 and accompanying text.

47. *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

48. Subdivision (c) was mentioned only in the context of whether or not there was a "readily discernible common thread" uniting all the initiative's provisions. *Id.* at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36. *See infra* notes 170-171 and accompanying text.

49. 40 Cal. 3d 550, 709 P.2d 1287, 221 Cal. Rptr. 118 (1985).

50. *Id.* at 574, 709 P.2d at 1302, 221 Cal. Rptr. at 723 (Mosk, J., dissenting). *See infra* note 142 and accompanying text.

51. *See Rodriguez II*, 186 Cal. App. 3d 707, 230 Cal. Rptr. 823 (1986); *Halliman v. Los Angeles Unified School Dist.*, 163 Cal. App. 3d 46, 209 Cal. Rptr. 175 (1984).

A. Restatement of Existing Law: Elusiveness of the Safe Schools Provision

The most restrictive interpretation of the Safe Schools Provision is that it says nothing new or different. Under this position, the language of article I, section 28(c) would be read to be consistent with current law. The obligations imposed by current statutes and cases would still be good law, and would not be superseded by subdivision (c).

Some provisions of state and federal constitutions are so elusive that courts either will not enforce them at all, or will enforce them in very limited ways. As Professor Laurence H. Tribe noted in his analysis of one such elusive provision—the Guaranty Clause of the U.S. Constitution⁵²—the ultimate issue in determining “the ability of the courts to derive enforceable rights from the constitutional provisions which . . . litigants invoke” is “whether it is possible to translate the principles underlying the . . . provision . . . into restrictions . . . or affirmative definitions . . . which courts can articulate and apply.”⁵³ Sometimes it is simply impossible to derive enforceable rights from a constitutional provision. Even though courts continue to pay lip service to the notion that all parts of constitutions must of necessity mean *something*,⁵⁴ certain provisions, by their nature, have little or no impact on legal disputes.⁵⁵

52. Article IV, section 4 of the United States Constitution provides in pertinent part: “The United States shall guarantee to every State in this Union a Republican Form of Government”

53. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 73, 76 (1978).

54. See *People v. Juarez*, 197 Cal. Rptr. 397, 400 (1983) (official opinion ordered depublished), in which the judge declares that although the initiative process has produced some poorly drafted measures, it is the obligation of the courts to “follow the clearly expressed will of the people.” See also *Hosemann*, *supra* note 5, at 21, where Judge Bartalini asserts that article I, section 28(c) is not merely “a policy statement” (as the Oakland School District argued), because “[t]o interpret otherwise would make this part of the constitution purposeless.”

55. One such provision is the so-called “right to liberty.” The California Constitution provides that all people “have inalienable rights. Among these are enjoying and defending . . . liberty.” CAL. CONST. art. 1, § 1. Yet, few California courts have even attempted to construe this right, and virtually all the cases have been decided *against* the parties who claimed that their right to liberty had been violated. See *In re Roger S.*, 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977); *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 95, 320 P.2d 473 (1958), *rev’d on other grounds* 359 U.S. 236; *In re Rust*, 181 Cal. 73, 183 P. 548 (1919); *Grant v. Adams*, 69 Cal. App. 3d 127, 137 Cal. Rptr. 834 (1977). Two “turn-of-the-century” cases actually enforce this right, but only as justifications for the well-settled rule of “freedom of contract.” See *Ex parte West*, 147 Cal. 774, 82 P. 434 (1905); *Ex parte Drexel*, 147 Cal. 763, 82 P. 429 (1905).

Professor Ronald Dworkin argues that in fact there is no such thing as right to liberty in our society. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 267, 269 (1977).

Another elusive provision is the Ninth Amendment of the United States Constitution. It provides: “The enumeration in the Constitution, of certain rights, shall not be construed to

In *Hosemann*, the most recent Safe Schools Provision controversy, the litigant and his supporters are asserting that article I, section 28(c) must necessarily, as part of the California Constitution, provide a cause of action to obtain relief.⁵⁶ However, the courts could reasonably hold that no enforceable rights can be derived from article I, section 28(c). The provision is simply too elusive because of the indefinite nature of the term "right," the inconclusive and contradictory will of the people, and the restatement nature of Proposition 8 language.

1. *The Indefinite Nature of the Word "Right"*

Since article I, section 28(c) is entitled "*Right to Safe Schools*," any inquiry into its interpretation must include an analysis of the word "right." Indeed, few words are more prevalent in legal writing. Use of the word in an enactment, however, does not guarantee anything. Courts have long recognized that the word "right," in and of itself, is an indefinite, generic term,⁵⁷ "broad enough to embrace whatever may be lawfully claimed."⁵⁸ In fact, the California Supreme Court has drawn a distinction between legal rights and "inchoate" rights, indicating that not all rights give rise to remedies: "[i]f the person asserting a claim can

deny or disparage others retained by the people." U.S. CONST. AMEND. IX. This Amendment, "both as a source of rights and . . . as a justification for judicial definition of nontextual fundamental rights," has been the subject of much controversy. 2 ROTUNDA, NOWAK & YOUNG, TREATISE ON CONSTITUTIONAL LAW 81 n.10 (1986). In *Griswold v. Connecticut*, 381 U.S. 479 (1965), for example, Justice Goldberg referred to it as "the forgotten Ninth Amendment." *Id.* at 490 n.6 (Goldberg, J., joined by Chief Justice Warren & Justice Brennan, concurring).

The problem of applying this difficult Amendment surfaced in *Roe v. Wade*, 410 U.S. 113 (1973), where the Court rejected the argument that the Ninth Amendment could be a basis for a woman's right to an abortion. In a concurring opinion, Justice Douglas (whose description in *Griswold* of the penumbras emanating from the Bill of Rights arguably pointed toward a liberal interpretation of any amendment's guarantees, see 381 U.S. at 484) declared that "the Ninth Amendment obviously *does not create federally enforceable rights*." *Roe v. Wade*, 410 U.S. at 210 (Douglas, J., concurring) (emphasis added).

Still another example of an elusive provision is the Guaranty Clause of the U.S. Constitution. See *supra* note 52. Professor Tribe, in discussing the line of cases from *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), to *Baker v. Carr*, 369 U.S. 186 (1962), points out that the courts have relied on the political question doctrine to find the Guaranty Clause generally unenforceable, and that the doctrine itself is simply part of a *larger question*: "whether the Constitution provides a cause of action a litigant can assert to obtain the requested judicial relief." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 79 n.41 (1978).

56. See *supra* notes 5-9 and accompanying text.

57. See *Hampton v. North Carolina Pulp Co.*, 223 N.C. 535, 546, 27 S.E.2d 38, 545 (1943), *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 306 (1871). See also *Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 40 S.E.2d 690, 695 (1946), *Weekley v. Weekley*, 126 W. Va. 90, 96, 27 S.E.2d 591, 594 (1943).

58. *Bankers Home Bldg. & Loan Ass'n v. Wyatt*, 139 Tex. 173, 162 S.W.2d 694, 696 (1942).

predict with certainty that it will be enforced by the courts, he has a legal right—otherwise, his claim remains an inchoate ‘right’ without a remedy.”⁵⁹

Professor Ronald Dworkin’s distinction between abstract and concrete rights is particularly helpful. An abstract right, he explains, is a *general* aim, “the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other . . . aims. . . . The grand rights of political rhetoric are in this way abstract.”⁶⁰ Concrete rights, on the other hand, are aims that are “more *precisely defined* so as to express more definitely the weight they have against other aims on particular occasions.”⁶¹

Nowhere in the language of article I, section 28 is there a precise definition of this “right” to safe schools. The authors of Proposition 8 appear to be relying on what Professor Peter Westen calls “the rhetoric of rights,”⁶² since “everything else being equal . . . we prefer to argue in favor of rights [rather] than against them.”⁶³ All the words defining the parameters of the “right” in the Safe Schools Provision are broad and overly general and do not provide assistance in interpreting the provision. The terms are widely used in grand political rhetoric because they invoke moving images that all of us can embrace.⁶⁴

Because the language of subdivision (c) is so indefinite and fails to indicate how its “general aim” is to be weighed against other aims, the courts could reasonably conclude that the right to safe schools, in its present form, is nothing more than an abstract, inchoate right.

2. *The Will of the People*

In construing a constitutional provision, courts look carefully at the

59. *Estate of Gogabashvele*, 195 Cal. App. 2d 503, 525, 16 Cal. Rptr. 77, 91 (1961).

60. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 93 (1977).

61. *Id.* (emphasis added).

62. Westen, *The Rueful Rhetoric of “Rights,”* 33 UCLA L. REV. 977, 978 (1986).

63. *Id.* at 977.

64. Perhaps the most famous use of the term “inalienable” (in its archaic form) can be found in the archetypal imagery of the United States Declaration of Independence: “that [all men] are endowed by their Creator with certain Unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” As Westen notes:

The language of rights tends to persuade not by illuminating the matters at issue, but by concealing them through linguistic sleight of hand. The rhetoric of rights derives its force from a deep-seated ambiguity in the ordinary meaning of the word “rights”—an ambiguity that causes disputing parties to assume away the very issues they purport to be addressing. The ambiguity is latent and hence does its work undetected (indeed, the ambiguity works precisely because it is undetected).

Westen, *supra* note 62, at 978 (emphasis in original).

original intent behind its adoption.⁶⁵ Generally, the intent of the voters and the drafters is considered in the case of an initiative measure.⁶⁶

A preferred method of ascertaining the popular will regarding a specific proposition is to look closely at the California Ballot Pamphlet⁶⁷ and attempt to project, from the arguments and summaries, just what the voters might have intended.⁶⁸ The June 1982 ballot pamphlet, however, contains no explanation of the Safe Schools Provision. The legislative analysis says only that article I, section 28(c) provides a right to safe schools.⁶⁹ This is eminently clear from reading the actual text of the provision. Moreover, no specific arguments for subdivision (c) are listed in the pamphlet, and the Safe Schools Provision is *not even mentioned* by the proponents of Proposition 8.⁷⁰

65. See *People v. Valentine*, 42 Cal. 3d 170, 720 P.2d 913, 228 Cal. Rptr. 25 (1986). See also *Baumbaugh v. San Diego County*, 44 Cal. App. 2d 898, 113 P.2d 218 (1941); *Kaiser v. Hopkins*, 6 Cal. App. 2d 537, 58 P.2d 1278 (1936).

For a thorough analysis of the "Original Intent" theory as applied to the Fourteenth Amendment of the United States Constitution, see Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603 (1978).

66. See *People v. Valentine*, 42 Cal. 3d at 177, 720 P.2d at 917, 228 Cal. Rptr. at 29 (defining the framers as "the drafters and the voters", before analyzing "the intent of the people" regarding various provisions of Proposition 8); see also *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) ("[the courts] should not prohibit the sovereign people from either expressing or implementing their own will on matters of such . . . importance . . . as their own perceived safety.").

67. California Ballot Pamphlets are compiled by the Secretary of State and provide the following information for each state proposition: the ballot title, a short summary, the Legislative Analyst's analysis, pro and con arguments and rebuttals, and the complete text of the proposition itself. These pamphlets are mailed by the state to all registered voters.

68. See *In re Lance W.*, 37 Cal. 3d 873, 888 n.8, 694 P.2d 744, 753 n.8, 210 Cal. Rptr. 631, 640 n.8 (1985); see also *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829 n.1, 134 Cal. Rptr. 839, 842 n.1 (1976).

Legislative committee reports, often so useful in both statutory and constitutional interpretation, are non-existent for initiative measures.

69. *Brosnahan*, 32 Cal. 3d at 302 app., 651 P.2d at 316 app., 186 Cal. Rptr. at 72 app.. The appendix to this case contains a complete reproduction of the 1982 California Ballot Pamphlet text relating to Proposition 8, including the analysis of subdivision (c) by the legislative analyst:

"Safe Schools. The Constitution currently provides that all people have the inalienable right of "pursuing and obtaining safety, happiness, and privacy." In addition, statutory law prohibits various acts upon school grounds which disturb the peace of students or staff, or which disrupt the peaceful conduct of school activities. This measure would add a section to the State Constitution declaring that students and staff of public elementary and secondary schools have the "inalienable right to attend campuses which are safe, secure, and peaceful."

Id.

70. See *id.* at 305-06 app., 651 P.2d at 319-20 app., 186 Cal. Rptr. at 75-76 app. The only mention of article I, section 28(c) in any of the ballot arguments is by critics of Proposition 8. See *infra* notes 111 & 275 and accompanying text.

Subdivision (c) is literally hidden within a lengthy proposition that is portrayed by its backers as a landmark in the long, arduous struggle for criminal justice, the rights of victims, and truth-in-evidence.⁷¹ One can only wonder how many people actually knew they were voting for an initiative that had anything to do with school safety, let alone for an affirmative duty that would make it easier to hold schools liable in a wide variety of contexts.⁷²

In *Hosemann*,⁷³ the trial court declared that the voters intended not only "to improve school safety . . . and to provide a civil remedy in damages to those . . . injured by failure to provide safe, secure, and peaceful schools," but also "to require increased security expenditures."⁷⁴ The court's reasoning appears to be that because the legislative analyst predicted possible increased claims and greater costs if subdivision (c) passed,⁷⁵ voters reading this fiscal analysis would vote for Proposition 8 if they believed that there should be increased claims and greater security costs.⁷⁶

This line of analysis is seriously flawed. People do not generally vote for an initiative because of the possibilities of increased claims and costs described in the fiscal analysis section.⁷⁷ They tend to base their decisions on the text of the initiative itself in light of certain key, widely-

71. Former Lieutenant Governor Mike Curb's words are typical of the arguments for the initiative: "It is time for the people to take decisive action against violent crime. For too long our courts and the professional politicians in Sacramento have demonstrated more concern with the rights of criminals than with the rights of innocent victims." *Brosnahan*, 32 Cal. 3d at 305 app., 651 P.2d at 319 app., 186 Cal. Rptr. at 75 app.

72. The initiative process in California has been the subject of much controversy during the past decade, with people on both ends of the political spectrum questioning the efficacy of this method of "participatory democracy." For an excellent presentation of this inquiry, see generally Walters, *Public Policy Gridlock: The Initiative as Decidedly Bad Lawmaking*, L.A. Daily Journal, July 14, 1986, at 4, col. 3 ("The initiative is now less a tool for expression of popular will than a device used by special interests, fringe groups, and others."). But see *People v. Juarez*, 197 Cal. Rptr. 397, 400 (1983):

One possible shortcoming of the initiative process is that the drafting of propositions may, at worst, be sloppy and, at best, not be carried out with the precision expected in legislative enactments. Our review of Proposition 8 in general . . . leads us to conclude that its draftsmanship leaves much to be desired. Poor draftsmanship, however, is no reason to refuse to follow [it].

73. *Hosemann*, *supra* note 5.

74. *Id.* at 30 (emphasis added).

75. See *Brosnahan*, 32 Cal. 3d at 304 app., 651 P.2d at 318 app., 221 Cal. Rptr. at 74 app. The legislative analyst wrote in the ballot pamphlet that subdivision (c) "could . . . increase claims against state and local governments relating to enforcement of the right to safe schools, [and could] increase school security costs to provide safe schools." *Id.* (emphasis added).

76. See *Hosemann*, *supra* note 5, at 30.

77. See Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. Cal. L. Rev. 922, 934 (1975) [hereinafter Note, *The California Initiative Process*]: "There are two factors which greatly inhibit [the electorate's] thoughtful consideration of the issues presented

publicized arguments.⁷⁸ Additionally, an inference that voters support increased claims and costs because they vote for an initiative that the legislative analyst says might cause such increases is questionable.⁷⁹ In fact, an argument can be made that the voters in 1982 wanted safer schools, but hoped that this could be accomplished *without* increased claims or costs.⁸⁰

It must be emphasized that the whole area of fiscal analysis and the perceived popular will is often speculative and rarely absolute. The legislative analyst himself stressed the uncertain nature of his predictions.⁸¹ Because of this uncertainty, the text of a voter's guide can be used "*as an aid*," but its language is not necessarily determinative.⁸²

by all but the most simple initiative: *the complexity of the ballot measure and the nature of the political campaign waged in its behalf*." *Id.* (emphasis added).

78. See *Brosnahan*, 32 Cal. 3d at 305-06 app., 651 P.2d at 319-20 app., 221 Cal. Rptr. at 75-76 app. Mr. Gann concludes with the following words:

[The people] are not only victims of crime, they are victims of our criminal justice system—the liberal reformers, lenient judges and behavior modification do-gooders who release hardened criminals again and again to victimize the innocent. It's time to restore justice to the system. Vote yes for victims' rights. Vote yes on Proposition 8.

79. In recent times, voters have rarely backed measures that require increased costs (and possible increases in taxes). Key propositions promulgated by Mr. Gann, for example, including Proposition 13 in 1978 and Proposition 4 in 1979, gained popular support because the California voters, upset by increasingly higher taxes, wanted to see *less* money spent by public entities. Arguably these same participants in the so-called "taxpayer's revolt" provided key votes for Proposition 8 in 1982.

80. The voters' recent support of Proposition 51, the "deep pockets" initiative designed to limit the liability of such public entities as school districts, is an indication that people would not want to see such "increased claims."

Proposition 51, the "Multiple Defendant Tort Damage Liability Initiative Statute" approved by California voters in June 1986, amended Civil Code section 1431 (joint liability), and added new sections 1431.1-1431.5 (several liability for non-economic damages and severability in general). See CAL. CIV. CODE §§ 1431, 1431.1-1431.5 (West Supp. 1987).

81. See *Brosnahan*, 32 Cal. 3d at 304 app., 651 P.2d at 318 app., 186 Cal. Rptr. at 74 app. ("The net fiscal effect of this measure *cannot be determined with any degree of certainty*. This is because [it] would depend on many factors that cannot be predicted. Specifically, it would depend on . . . how various provisions are implemented by the . . . school districts." (emphasis added)).

82. See *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829 n.1, 134 Cal. Rptr. 839, 842 n.1 (1976). For a detailed explanation of the difficulties involved in relying on the ballot pamphlet to discern voter intent, especially regarding complex initiative measures such as Proposition 8, see *In re Lance W.*, 37 Cal. 3d 873, 910, 694 P.2d 744, 769, 210 Cal. Rptr. 631, 656 (Mosk, J., dissenting) (1985).

When a ballot proposal is lengthy "only the most diligent voter [will] wade through [it]." . . . The busy voter does not have the time to devote to the study of long, wordy, [sic] propositions. . . . If improper emphasis is placed upon one feature and the remaining features ignored, or if there is a failure to study the entire proposed amendment, the voter may be misled as to the over-all effect of the proposed amendment.

The intent of the drafters is equally nebulous. As indicated above,⁸³ the authors of Proposition 8 said absolutely nothing about *their* intent in the June 1982 California Ballot Pamphlet. Although Mr. Gann wrote one of the three arguments in favor of the initiative⁸⁴ and was the sole author of the rebuttal to the arguments against it,⁸⁵ no references can be found regarding the Safe Schools Provision.⁸⁶

Rather than relying on nebulous notions of intent, courts should consider the express language of the statute. The text of subdivision (c) itself made no mention of affirmative duty or increased liability. "A broad, general, undefined right to safe schools was described . . . nothing more."⁸⁷ Furthermore, extrinsic evidence reveals that the co-authors of Proposition 8 stand for opposing points of view on the key issue of cost. In a recent article, Judge Nicholson declared that his "clear intent" was "to mandate necessary security for all California public schools, at all levels, *regardless of cost*."⁸⁸ Mr. Gann, however, more than anyone else in the state, personifies the so-called "taxpayer revolt" and its accompanying demand that public entities find a way to spend *less* money.⁸⁹

If it can be shown that the framers (both the voters and the drafters) intended a specific, concrete, enforceable right, then subdivision (c) could not be deemed elusive. However, an analysis of this issue reveals that the framers' intent is at best contradictory, and at worst unfathomable.

3. The "Restatement Effect" of the Proposition 8 Language

In addition to the indefinite nature of the word "right" and the inconclusive will of the people regarding article I, section 28(c), the California Supreme Court has recognized a problem with respect to Proposition 8 language in general. In the recent case of *People v. Valentine*,⁹⁰ the court conceded that "several provisions of Proposition 8 are

Id. (citation omitted) (quoting Note, *The California Initiative Process*, *supra* note 77, at 934).

See also Zimmerman, *The Campaign That Couldn't Win*, L.A. Times, Nov. 9, 1986, § 5, at 6, col. 3 (bemoaning "the absence of an informed electorate").

83. See *supra* notes 70-72 and accompanying text.

84. *Brosnahan*, 32 Cal. 3d at 305 app., 651 P.2d at 319 app., 186 Cal. Rptr. at 75 app..

85. *Id.* at 306 app., 651 P.2d at 320 app., 186 Cal. Rptr. at 76 app.

86. The silence surrounding subdivision (c) leads one to wonder whether or not the authors had anything specific in mind when they added the right to safe schools to this wide-ranging proposition.

87. See generally *Brosnahan*, 32 Cal. 3d at 302 app., 651 P.2d at 316 app., 186 Cal. Rptr. at 72 app.

88. Hanelt, Nicholson & Washburn, *supra* note 15, at 14.

89. See e.g., M. Oliver, *Gann Again*, 6 CAL. LAW. 48 (Nov. 1986); R. Ulrich, *Promises, Promises: Are Jarvis and Gann as Good as Their Words?*, L.A. Daily Journal, June 27, 1986, § 1, at 4, col. 3. See also *supra* notes 14 & 79.

90. 42 Cal. 3d 170, 720 P.2d 913, 228 Cal. Rptr. 25 (1986).

'cosmetic,' since they simply restated existing law."⁹¹ While rejecting the defendant's claim that the provision in question (disclosing the nature of a prior felony) constituted a restatement, Justice Grodin explained that "in the examples defendant cites, the '*restatement*' effect of the *Proposition 8* language is apparent from its terms. Defendant fails to show how section 28(f)'s language, which seems directly contrary to 'existing law,' has merely 'restated' it."⁹²

Although the court in *Valentine* did not mention the Safe Schools Provision, the broad language of the decision indicates that other provisions of section 28 might be held to have merely restated existing law. The repeated references to the *entire* proposition, rather than just article I, section 28(f), plus the concession that in fact "*several* provisions of Proposition 8 are 'cosmetic' lead to a conclusion that other subdivisions might also be deemed 'cosmetic' " if (1) the restatement language is apparent from their terms, and/or (2) the provisions are shown to have merely restated existing law.⁹³

Subdivision (c) itself does nothing more than restate existing law. The California Constitution already contains a general right to safety: "All people . . . have inalienable rights. Among these are . . . *pursuing and obtaining safety*."⁹⁴ In addition, the California Civil Code provides further statutory protection: "the right of protection from bodily restraint or harm."⁹⁵

Proponents of Proposition 8 might contend that by including the word "schools" in this right to safety, voters have created specific new protection when only general protection had previously existed. The language of the preamble, after all, states that "public safety extends to public . . . school campuses."⁹⁶ Arguably, however, this language also merely restates existing law. School campuses would be one of the *first* places the courts would look to apply a right to safety that has existed in

91. *Id.* at 178, 720 P.2d at 917, 228 Cal. Rptr. at 29.

92. *Id.* (emphasis added).

93. While discussing whether or not article I, section 28(f) should be deemed "cosmetic," Justice Grodin stated the following: ". . . in the examples defendant cites, the '*restatement*' effect of the Proposition 8 language is *apparent from its terms*." *Id.* at 178, 720 P.2d at 917, 228 Cal. Rptr. at 29 (emphasis added). See *supra* note 92 and accompanying text. This observation leads implicitly to the conclusion that other provisions could be deemed cosmetic if the restatement language *is* apparent from their terms.

Similarly, Justice Grodin noted that the defendant failed "to show how section 28(f)'s language, which seems directly contrary to 'existing law,' *has merely 'restated' it*." *Id.* at 178, 720 P.2d at 917, 228 Cal. Rptr. at 29 (emphasis added). Provisions could thus be deemed cosmetic if shown to be mere restatement of existing law.

94. CAL. CONST. art. I, § 1 (emphasis added).

95. CAL. CIV. CODE § 43 (West 1982).

96. CAL. CONST. art. I, § 28(a).

the California Constitution *and* the Civil Code since the 1800's, given the large number of relatively weak and defenseless persons to be found in a school setting.

It is clear that there is a problem with the Proposition 8 language. In *People v. Juarez*,⁹⁷ decided soon after Proposition 8's passage, the Court of Appeal stated: "Our review of Proposition 8 in general . . . leads us to conclude that its draftsmanship leaves much to be desired."⁹⁸ Moreover, the California Supreme Court's recent discussion of "the re-statement' effect of Proposition 8 language" in *Valentine*⁹⁹ further supports the argument that article I, section 28(c) is yet another elusive constitutional provision.

Subdivision (c) is simply too indefinite to be of any use to the courts at the present time. Too many questions have been raised regarding the language of Proposition 8 and the "framers' intent." It is thus reasonable to conclude that the Safe Schools Provision is nothing more than a re-statement of existing law, from which the courts may not derive additional rights.

B. Not Self-Executing: A Call for Implementing Legislation

A second interpretation of article I, section 28(c) is that it represents an invitation to the legislature to come up with a statutory scheme for implementing the provision. A court following this position might base its decision on a literal reading of Chief Justice Marshall's words in *Marbury v. Madison*: "[i]t cannot be presumed that any clause in the constitution is to be without effect."¹⁰⁰ The court would thus reject the implication that the voters did not consider the Safe Schools Provision when they voted for Proposition 8.¹⁰¹

The key issue under this interpretation is whether or not the Safe

97. 197 Cal. Rptr. 397 (1983) (official opinion ordered depublished).

98. *Id.* at 400.

99. 42 Cal. 3d 170, 178, 720 P.2d 913, 917, 228 Cal. Rptr. 25, 29 (1980).

100. 5 U.S. (1 Cranch) 137, 174 (1803).

101. See *supra* notes 71-72, 82 and accompanying text. Generally, voters are presumed to have intended to be bound by all the provisions of any initiative they have approved. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 252, 651 P.2d 274, 283-84, 186 Cal. Rptr. 30, 39-40 (1982) (quoting *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 243-44, 583 P.2d 1281, 1299, 149 Cal. Rptr. 239, 256-57 (1978)). "[W]e ordinarily should assume that the voters who approved a constitutional amendment . . . have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered.").

Schools Provision is self-executing.¹⁰² If a constitutional provision is not self-executing, then legislation is necessary "to give it a reasonable and practical operation" before it can be implemented.¹⁰³ California courts have established specific guidelines for determining whether a provision is self-executing. First, the provision must be clear, precise and unambiguous. It must supply "*a sufficient rule* by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced."¹⁰⁴ A provision does not supply a sufficient rule, however, "when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."¹⁰⁵

No explicit rule has been supplied by which the broad, general language of subdivision (c) can be enforced. As Justice Mosk wrote in *Brasnaham v. Eu*,¹⁰⁶ in analyzing the language of the Safe Schools Provision, "[a] voter . . . would reasonably expect that a lengthy amendment which states . . . that 'students and staff have the right to be safe and secure in their persons' on campus would . . . propose *some protection* of that right in its substantive provisions."¹⁰⁷ However, the language of article I, section 28(c) provides no clues as to how the right to safe schools would be "protected." Thus the legislature has the burden to establish a statutory scheme that would spell out exactly how the provision would be

102. "A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation." *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 152, 101 N.E.2d 289, 291 (1951).

Examples of provisions that have generally been deemed self-executing include the prohibition against taking property for public use without just compensation (*Pacific Outdoor Advertising Co. v. City of Burbank*, 86 Cal. App. 3d 5, 149 Cal. Rptr. 906 (1978)), the right to propose constitutional amendments by petition (*Wolverine Golf Club v. Hare*, 384 Mich. 461, 185 N.W.2d 392 (1971)), and a provision that right and justice shall be administered without delay (*Perkins v. Cooper*, 155 Okla. 73, 4 P.2d 64 (1931)).

Provisions that have been held not self-executing include the federal fifth amendment privilege against compelled self-incrimination (*Roberts v. U.S.*, 445 U.S. 552 (1980)), a provision authorizing change of venue in certain cases (*Older v. Superior Court*, 157 Cal. 770, 109 P. 478 (1910)), and the provision of the federal constitution providing for the extradition of a fugitive from justice (*In re Tenner*, 20 Cal. 2d 670, 128 P.2d 338 (1942)). Constitutional provisions that are not self-executing remain inoperative until supplemental legislation renders them effective. *State ex rel. Cotter v. Leipner*, 138 Conn. 153, 83 A.2d 169 (1951).

103. See *French v. Teschemaker*, 24 Cal. 513, 543 (1864).

104. *Flood v. Riggs*, 80 Cal. App. 3d 138, 154, 145 Cal. Rptr. 573, 582 (1978) (emphasis added).

105. *Older v. Superior Court*, 157 Cal. 770, 780, 109 P. 478, 482 (1910) (citation omitted); see also *Stockton Civic Theatre v. Board of Supervisors of San Joaquin County*, 66 Cal.2d 13, 423 P.2d 810, 56 Cal. Rptr. 658 (1967).

106. 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982).

107. *Id.* at 11-12, 641 P.2d at 206, 181 Cal. Rptr. at 106 (Mosk, J., concurring & dissenting) (emphasis added).

enforced.¹⁰⁸

The indefinite nature of the word "right"¹⁰⁹ and the inconclusive will of the people¹¹⁰ are both problems relevant to the determination of whether article I, section 28(c) is self-executing. As Stanley M. Roden, former District Attorney of Santa Barbara County, stated in the 1982 California Ballot Pamphlet, "[n]obody knows what the so-called 'safe-schools' section means. The likely result of this provision is constant court battles over compliance."¹¹¹ These court battles can be avoided if the legislature steps in at this point in time.¹¹²

108. Arguably, the State Legislature has already taken the first steps toward implementing article I, section 28(c). In 1982, Chapter 395 was added to Penal Code section 627 (which already restricted the access of unauthorized persons into school campuses), authorizing school principals to refuse or revoke an outsider's registration, CAL. PENAL CODE § 627.4 (West Supp. 1987), and establishing a new misdemeanor for refusal to leave school grounds, CAL. PENAL CODE §§ 627.7, 627.8(a) (West Supp. 1987). A new section was also added to the legislative declaration, stating that "[i]t is the intent of the Legislature in enacting this chapter . . . to thereby implement the provisions of Section 28 of Article I . . . which guarantee all students and staff the inalienable constitutional right to attend safe, secure, and peaceful public schools." CAL. PENAL CODE § 627(c) (West Supp. 1987). In 1985, Chapter 1457 was added to the Education Code, expressly recognizing "that all pupils enrolled in the state public schools have the inalienable right to attend classes on campuses which are safe, secure, and peaceful." CAL. EDUC. CODE § 32261 (West Supp. 1987). This new chapter mandated the establishment of interagency safe school model programs for 1985-86 and 1986-87, and encouraged "school districts, county offices of education, and law enforcement agencies to develop and implement interagency strategies, programs, and activities which will . . . reduce the rates of school crime and vandalism." CAL. EDUC. CODE §§ 32261-32262, 32270-32274 (West Supp. 1987).

Chapter 483 was also added to the Penal Code in 1984, increasing punishment to a \$2,000 fine, one year in prison, or both, for an assault or battery committed against *any* person on school grounds. CAL. PENAL CODE §§ 241.2, 241.3, 243.3 (West Supp. 1987). However, no reference to article I, section 28(c) was included in this addition.

109. See *supra* note 55.

110. See *supra* notes 65-89 and accompanying text.

111. Gilbert, Roden & Goggin, *Argument Against Proposition 8*, reprinted in Brosnahan, 32 Cal. 3d at 306 app., 651 P.2d at 320 app., 186 Cal. Rptr. at 76 app.

112. California lawmakers are beginning to recognize the need for supplemental and enabling legislation in connection with article 1, section 28(c). On March 3, 1987, Oakland Assemblyman Elihu Harris introduced Assembly Bill (AB) 1172, the "Safe Schools Act of 1987." Amended in Assembly on April 6, 1987, this bill would add Article 16 (commencing with Section 35360) to Chapter 3 of Part 21 of the Education Code.

Without expressly saying so, AB 1172 appears to recognize that the Safe Schools Provision is not self-executing: Other than the specific criminal law provisions contained in the Victims' Bill of Rights, the people provided no detail as to the manner in which subdivision (c) of section 28 of article I of the California Constitution should be implemented. Cal. A.B. 1172, 1987 Cal. Legis. Serv. 96-40 (West).

The proposed section 35361 of the Education Code outlines the intent and purpose of this new legislation, including the following goals: providing "students, parents, teachers, staff, and administrators with a recommended procedure for . . . resolving school safety problems,"

The nature of a provision can also be determined by an analysis of its language. If its language is "prohibitory", it is generally deemed self-executing.¹¹³ Article I, section 28(c), however, does not specifically prohibit anything; the right to safe schools is described in positive terms. A provision is only self-executing when "a complete rule" is spelled out, "broad enough [in its terms] to embrace and definitely settle all conditions."¹¹⁴ As it stands now, nothing specific is either prohibited or required by the Safe Schools Provision. The legislature must define the specific acts that would be prohibited, and/or the specific acts that would be required.

Finally, some courts will presume that a constitutional provision is self-executing, unless it appears that legislation is required.¹¹⁵ *Fenton v. Groveland Community Services District*¹¹⁶ provides a recent example of a decision based on this presumption. In determining whether or not the right to vote under the California Constitution¹¹⁷ was self-executing, the court concluded that "the right to vote . . . clearly does not require enabling legislation."¹¹⁸

A right to vote is implemented simply by allowing disenfranchised people to vote, and/or penalizing those who prevent qualified voters from exercising their right. This remedy is clearly discernible; no legislation is required to spell it out. The nebulous right to safe schools, how-

encouraging "the solution of school safety problems at the school site level," and minimizing "court intervention in the local handling of school safety matters." *Id.* at 96-100.

In a key passage that is arguably included because of such recent developments as the *Hosemann* decision (see *infra* notes 208-215 and accompanying text), AB 1172 recognizes that "[local educational] agencies cannot be guarantors of the safety of students, teachers, or staff from risks that could not have been reasonably anticipated or corrected, and that subdivision (c) . . . does not change the traditional tort liability of local educational agencies for injuries caused by their negligence or the negligence of their employees." *Id.* (emphasis added).

113. See *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 P. 3 (1886).

114. *French v. Teschemaker*, 24 Cal. 518, 540 (1864).

115. See *Fenton v. Groveland Community Services Dist.*, 135 Cal. App. 3d 797, 805, 185 Cal. Rptr. 758, 762 (1982); *Flood v. Riggs*, 80 Cal. App. 3d 138, 145 Cal. Rptr. 573 (1978).

This modern presumption appears to stem from a change in the way constitutions are constructed. See McMurray, *Some Tendencies in Constitution Making*, 2 CALIF. L. REV. 203 (1913-14): "From being a mere scheme or plan of government, the constitutions of later time have become, in large part, codes of statutory law Indeed, so far has this tendency upon the part of the people to enact legislation in the form of constitutional amendments extended, that courts have been obliged to recognize this phenomenon, and to change their theory of constitutional interpretation." *Id.* at 209.

116. 135 Cal. App. 3d 797, 805, 185 Cal. Rptr. 758, 762 (1982).

117. CAL. CONST. art. II, § 2.

118. 135 Cal. App. 3d at 805, 185 Cal. Rptr. at 762 (emphasis added). The court referred to the "special dignity" accorded the rights of free speech and free press," which "afforded plaintiffs the right to seek damages without enabling legislation. The right to vote is no less worthy of protection." *Id.*

ever, does not suggest any remedy. No specific methods of implementation are either expressed or implied in the entire section 28 of article I. As Chief Justice Bird pointed out in *Brosnahan v. Brown*,¹¹⁹ "[regarding] the provision creating a right to safe schools[,] . . . [n]one of the other provisions . . . are even remotely connected to implementing that right."¹²⁰

The judge in *Hosemann*¹²¹ argued that article I, section 28(c) must be self-executing, relying on the recent decisions in *Porten v. University of San Francisco*¹²² and *Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills*.¹²³ The plaintiff in *Porten* alleged that the university violated his right to privacy¹²⁴ by disclosing his grades from an out-of-state school to the State Scholarship and Loan Commission. The plaintiff in *Laguna Publishing Co.* alleged that the Golden Rain Foundation violated his right to free speech/free press¹²⁵ by preventing delivery of the Laguna News Post at Rossmoor Leisure World. In both cases, the rights were deemed self-executing and the court found for the plaintiff. Judge Bartalini's reasoning in *Hosemann* appears to be that if other judges in recent civil rights cases concluded, with little or no analysis, that these rights must have been self-executing, the right to safe schools should also be deemed self-executing.¹²⁶

However, neither the right to privacy nor the right to free speech are comparable to the "new" right in subdivision (c). Both are traditional

119. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

120. *Id.* at 274, 651 P.2d at 297, 186 Cal. Rptr. at 53 (Bird, C.J., dissenting) (emphasis added).

121. *See supra* note 5.

122. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).

123. 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982).

124. CAL. CONST. art. 1, § 1.

125. CAL. CONST. art. 1, § 2.

126. *See Hosemann, supra* note 5, at 30-31. Judge Bartalini uses Kimberly Sawyer's Pacific Law Journal article, *see supra* note 17, as his direct source here: "Ms. Sawyer's article outlines existing law through which the subject constitutional provisions may be interpreted. Ms. Sawyer analogizes the inalienable right conferred by these constitutional provisions with a line of cases wherein it has been held the right to privacy is self-executing and therefore confers judicial right of action on all Californians." *Hosemann, supra* note 5, at 30-31.

Ms. Sawyer herself writes the following: "California courts have held that other inalienable rights are self-executing, such as the right to privacy [*Porten*] and the right to free speech and press [*Laguna*]. The courts are generally conclusionary, stating only that the provision is self-executing, but their conclusion is appropriate for the following reason. A self-executing provision is one that is in effect immediately and does not depend on the Legislature to give it life. An inalienable right is also, by definition, not dependent on the Legislature for existence, for inalienable rights are not granted by the government but inherent in every person. The courts, therefore, are justified in concluding that inalienable rights are self-executing." Sawyer, *supra* note 17, at 1322.

rights that have been accorded "special dignity"¹²⁷ and embody clearly defined remedies, while the right to safe schools suggests no clear remedies. If any part of the state constitution is analogous to subdivision(c), it is the state's duty to educate its children,¹²⁸ since both sections focus on obligations of the schools. The courts have long held that the duty to educate is *not* self-executing, and must be implemented by statute.¹²⁹

The Safe Schools Provision contains only a broad, general principle; it gives us no guidelines as to how this principle should be applied. Other rights that have been deemed self-executing by the courts suggest clear remedies, but article I, section 28(c) does not suggest, either expressly or impliedly, any discernible remedies. The self-executing issue cannot be taken for granted. Some new provisions simply require legislation before they can be implemented. It is reasonable to conclude that article I, section 28(c) is not self-executing. Under this interpretation, until the legislature defines the specific acts that would be prohibited and/or the specific acts that would be required, the Safe Schools Provision can have no effect.

C. Fewer Procedural Rights and Safeguards in a School Setting

A third interpretation of article I, section 28(c) is that it maximizes school safety by making it easier to prosecute those who commit crimes on school grounds. This position represents a reasonable middle ground between the interpretation that article I, section 28(c) is simply a restatement and the interpretation that it imposes an affirmative duty to make schools safe no matter what the cost.

The law is well-settled that whenever the language of a constitution admits of doubt, construction should follow *the spirit and purpose* of the instrument.¹³⁰ Although the court in *Brosnahan v. Brown*¹³¹ upheld the constitutionality of Proposition 8, its decision arguably points toward a limiting interpretation of article I, section 28(c) by delineating the spirit and purpose of the Victims' Bill of Rights:

Each of [Proposition 8's] several facets bears a common concern . . . [T]he 10 sections were designed to strengthen procedural and substantive safeguards for victims in our *criminal justice system*. . . . This goal is the readily discernible common thread which

127. See *Fenton v. Groveland Community Services Dist.*, 135 Cal. App. 3d 797, 805, 185 Cal. Rptr. 758, 762 (1982).

128. See CAL. CONST. art. IX.

129. See *People v. Board of Education of Oakland*, 55 Cal. 331, 336-37 (1880); *Gonzales v. State*, 29 Cal. App. 3d 585, 592, 105 Cal. Rptr. 804, 808 (1972).

130. *Fairbank v. United States*, 181 U.S. 283, 289 (1900) (emphasis added).

131. 32 Cal. 3d 236, 651 P.2d 275, 186 Cal. Rptr. 30 (1982).

unites all of the initiative's provisions in advancing its common purpose.¹³²

The *Brosnahan* court also attempted to define what the word "safety" in section 28(c) really means: "The rights of victims [in Proposition 8] include . . . the expectation that 'persons who commit felonious acts' shall be detained, tried and punished so that the public safety is protected. . . . 'Such public safety extends to . . . school campuses.'"¹³³ Thus it becomes apparent that "safety" in Proposition 8 means protection of the public through detention, trial and punishment of felons. Neither this "definition" nor *Brosnahan's* explanation of the purpose behind the provision show any intent to provide a civil cause of action for those injured on school property.

Arguably, when the people approved Proposition 8, they voted for subdivision (c) within the context of the Victims' Bill of Rights/Truth-in-Evidence law. This analysis was suggested by the courts in *Halliman v. Los Angeles Unified School District*¹³⁴ and *Gordon v. Santa Ana Unified School District*.¹³⁵ In these two cases, the courts examined possible applications of the Safe Schools Provision. Both courts concluded that article I, section 28(c) applied to criminal cases rather than civil disputes, and both agreed that it mandated a less lenient, more uncompromising approach in the procedural treatment of accused and convicted persons. Under this analysis, consistent with *Halliman*, *Gordon*, and *In re William G.*,¹³⁶ the Safe Schools Provision only means that people committing crimes on school grounds should have fewer procedural rights and safeguards.

In *Halliman*, the court held that a teacher who had been assaulted by a student on school grounds could not recover under subdivision (c), because the Safe Schools Provision is limited to procedural matters in the criminal justice system and does not create an exception to the exclusive remedy of the worker's compensation statute.¹³⁷ The court determined that article I, section 28(c) was concerned with "the broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons' sought in the state's criminal justice sys-

132. *Id.* at 247, 651 P.2d at 297, 186 Cal. Rptr. at 53 (emphasis added).

133. *Id.* at 247-48, 651 P.2d at 280-81, 186 Cal. Rptr. at 36-37 (quoting CAL. CONST. art. I, § 28(a)) (emphasis added).

134. 163 Cal. App. 3d 46, 209 Cal. Rptr. 175 (1984).

135. 162 Cal. App. 3d 530, 208 Cal. Rptr. 657 (1984).

136. 40 Cal. 3d 550, 709 P.2d 1278, 221 Cal. Rptr. 118 (1985). See *supra* notes 42-43, 45 & 49-50 and accompanying text.

137. 163 Cal. App. 3d at 52, 209 Cal. Rptr. at 178.

tem," not with a teacher's ability to recover against a school district.¹³⁸

In *Gordon*, the court found the exclusionary rule inapplicable in a high school disciplinary proceeding and upheld the one-year suspension of a student for possession of marijuana which had been discovered by the assistant principal.¹³⁹ Unlike *Halliman*, article I, section 28(c) was cited by the court in support of its position.¹⁴⁰ Like *Halliman*, however, article I, section 28(c) was applied to procedural matters in the criminal justice system.¹⁴¹

In *In re William G.*, the California Supreme Court adopted the reasonable suspicion standard for student searches and seizures. Justice Mosk, agreeing with the adoption of this looser standard but disagreeing with the court's application of it in the case, emphasized the importance of the Safe Schools Provision in support of his position that evidence should be more easily obtainable in a school setting: "[we] must also realize that innocent, law-abiding students have a constitutional right to protection from crime and criminals, and are entitled to a safe school environment. The people of California made that clear when they adopted article I, section 28, subdivision (c)"¹⁴² Once again, the Safe Schools Provision is cited in the context of a criminal proceeding, not a civil action.

Since this interpretation represents an intermediate position, it could be attacked by both proponents and critics of Proposition 8. One side could claim that it does not go far enough, and call for stronger interpretations.¹⁴³ The other side would undoubtedly object to the curtailing of civil liberties that might occur if this position were followed.¹⁴⁴ While

138. *Id.* (quoting CAL. CONST. art I, § 28(a)) (emphasis added). See also *People v. Campos*, 183 Cal. App. 3d 926, 934, 228 Cal. Rptr. 470, 475 (1986) ("The obvious purpose of Proposition 8 was to conform California's criminal procedure law to federal law").

139. 162 Cal. App. 3d at 544, 208 Cal. Rptr. at 666-67.

140. "[W]e do not discount . . . the duty of the school administration to protect law abiding students from delinquents among them, an obligation recently emphasized by the electorate [CAL. CONST., art. I, § 28, subd. (c)]. Consequently . . . we hold the exclusionary rule inapplicable in high school disciplinary proceedings." *Id.* (emphasis added).

141. The preamble to article I, section 28 also supports this position. It provides, in pertinent part: "[t]o accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives." CAL. CONST. art. I, § 28.

142. *In re William G.*, 40 Cal. 3d at 574, 709 P.2d at 1302-03, 221 Cal. Rptr. at 133-34 (Mosk, J., dissenting).

143. See *infra* notes 150-217 and accompanying text.

144. It should be pointed out, however, that there are precedents for abridging civil liberties in this manner. Any one who goes to an airport today, for example, and walks up to a security checkpoint, is generally deemed to be impliedly consenting to a search. See e.g., *United States v. Herzbrun*, 723 F.2d 773 (11th Cir. 1984). But see 3 W. LAFAYE, SEARCH &

cogent arguments can be made on both sides, Justice Mosk perhaps best sums up the difficulties facing schools today and the need to take control:

We live in troublesome, indeed hazardous, times. A decade or two ago the potential delinquent pupil was merely truant, smoked cigarettes, and drove hot rod cars. Today the delinquent of the same age is often violent, and some use drugs and deadly weapons.

If we are not to have countless future generations of adult criminals, we must make as certain as possible that we do not permit criminality to begin with juveniles in public schools. We do not have police officers in our classrooms. We do not have parents in our classrooms. Therefore we must give to teachers and principals all the tools they reasonably need to preserve order in classrooms and school grounds.¹⁴⁵

By applying article I, section 28(c) to facilitate the discovery and use of potentially incriminating evidence, the courts would not only be following precedents established by four recent California cases,¹⁴⁶ but would be continuing in the direction mapped out by three recent United States Supreme Court cases.¹⁴⁷ People contemplating criminal conduct

SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.6, at 359 (1978 & 1986 Supp.) (criticizing this approach as "basically unsound"). Travelers crossing borders, or their functional equivalent, know that they may be searched without probable cause. See *Carroll v. United States*, 267 U.S. 132 (1925). Americans are also showing an increasing willingness to support sobriety checkpoints on urban streets in order to counter the menace of drunk drivers. See Miller, *Sobriety Checkpoints Likely to Be Upheld, One Way or Another*, L.A. Daily Journal, Nov. 27, 1986, at 4 col. 3 (discussing *Ingersoll v. Palmer*, 221 Cal. Rptr. 659 (1986) (official opinion ordered depublished), and related cases). People accept these random and often intrusive searches because of the recognized dangers that such measures are designed to prevent. Arguably, in approving the Safe Schools Provision, California voters have recognized a danger on public school campuses which would require a similar loosening of search and seizure standards.

145. *In re William G.*, 40 Cal. 3d 550, 574, 709 P.2d 1287, 1302-03, 221 Cal. Rptr. 118, 133-34 (1985) (Mosk, J., dissenting).

146. *Id.*; *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982); *Halliman v. Los Angeles Unified School Dist.*, 163 Cal. App. 3d 46, 209 Cal. Rptr. 175 (1984); *Gordon v. Santa Ana Unified School Dist.*, 162 Cal. App. 3d 530, 208 Cal. Rptr. 657 (1984).

147. Courts following this third interpretation of subdivision (c) could facilitate prosecution of suspects in a number of ways. One approach would simply involve a loose interpretation of the reasonable suspicion standard outlined in *T.L.O.*, 469 U.S. 325, 350 (1985), and *In re William G.*, 40 Cal. 3d at 562, 709 P.2d at 1294, 221 Cal. Rptr. at 125. See *supra* notes 42-45 and accompanying text. What might be unreasonable suspicion in a generalized context could be held reasonable in a school setting.

Under a second approach, California could build on the decision of *United States v. Leon*, 468 U.S. 897 (1984), and establish a new good faith exception to the exclusionary rule. This exception might allow evidence obtained by school officials in violation of the Fourth Amendment to be admissible at trial if the officials acted with a good faith belief in the legality of their actions.

Under a third approach, this state could follow the lead of the United States Supreme Court in *New York v. Quarles*, 467 U.S. 649 (1984), and extend the public safety exception to

on school grounds would know that, statistically, they were more likely to be convicted, and might think twice before acting.¹⁴⁸ Students might not bring drugs or weapons to school once they found out how much easier it was to be caught. This potential deterrent effect would be consistent with the purpose of article I, section 28(c) as articulated by the authors of the proposition *and* the trial court in *Hosemann*.¹⁴⁹

D. Additional Duties/Remedies Under Existing Tort Law

A fourth interpretation is that article I, section 28(c) provides for additional duties and/or remedies under existing tort doctrines when someone is injured in a school setting. Under this view, the courts would not actually create a new affirmative duty, but would build upon the highly-developed body of law that has already been established.¹⁵⁰ Three concepts are particularly relevant in this regard: the special relationship doctrine, the professional standard of care, and the availability of injunctive relief.

1. Expanded Liability Under the Special Relationship Doctrine

The law has long recognized that some relationships may give rise to a higher duty of care under an exception to the general rule that a person is not liable for nonfeasance.¹⁵¹ If the courts determine that "a special relation" exists between an actor and another party or an actor and a

the *Miranda* rule. In *Quarles*, the police interrogated a defendant without giving the *Miranda* warnings because they suspected the existence of weapons nearby. Justice Rehnquist, writing for the majority, declared that "this case presents a situation where concern for public safety must be paramount to adherence to the literal language of . . . *Miranda*." *Id.* at 653. Since the California voters have approved an initiative which "extends public safety" to the schools (CAL. CONST. art. I, § 28(a)—apparently showing the same concern for public safety as Justice Rehnquist), the courts could be justified in holding that the public safety exception applies to *all* custodial interrogations, in a school setting, concerning evidence which might endanger the safety of students and staff.

148. The recent decision in *United States v. Holland*, 810 F.2d 1215 (D.C. Cir. 1987), arguably reflects a trend, with the courts becoming more supportive of harsher punishment for crimes committed in a school context. *Holland* upheld the constitutionality of a 1984 law permitting tougher punishment for selling illegal drugs *near* a school.

149. See *supra* note 5.

150. See *supra* notes 21-46 and accompanying text.

151. Very early on, our "highly individualistic" common law recognized a difference between "misfeasance" and "nonfeasance." As Prosser explains, "The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse." See W. PROSSER, *THE LAW OF TORTS* § 56 (5th ed. 1984).

Although exceptions were later recognized for those "engaged in public callings," and to a "limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action," a person, in general, is still not liable for failure to act. See *id.*; see also RESTATEMENT (SECOND) OF TORTS § 314 (1965).

third person, the actor may be liable for failure to control the third person.¹⁵² Increasingly, the relationship of a school district to its students has been deemed "special."¹⁵³

In the recent case of *Rodriguez v. Inglewood Unified School District*,¹⁵⁴ the court analyzed the extent of a school's duty of care under the special relationship doctrine. Samuel Rodriguez, a high school student who had been stabbed on the Inglewood High campus by an unknown, non-student assailant, filed a complaint for personal injuries against the district. He argued that the district negligently failed to provide "adequate security and protection" against acts of violence involving dangerous weapons," even though the school had "a long history" of such acts.¹⁵⁵ The court in *Rodriguez I* held that no special relationship existed. The Safe Schools Provision was not mentioned, and the court focused on the issues of foreseeability and public policy in finding no higher duty.¹⁵⁶

After determining that its holdings in *Peterson v. San Francisco Community College District*¹⁵⁷ and *Lopez v. Southern California Rapid Transit District*¹⁵⁸ could have significant impact on the final disposition of *Rodriguez*, the California Supreme Court retransferred *Rodriguez* to the Court of Appeal under California Rule of Court 29.4¹⁵⁹ with instruc-

152. See RESTATEMENT (SECOND) OF TORTS § 315 (1965). Traditionally, the commonly recognized special relationships included (1) common carrier and passengers, (2) innkeeper and guests, and (3) possessor of land and members of the public who enter in response to landowner's invitation. See RESTATEMENT (SECOND) OF TORTS § 314A (1965).

In California, the special relationship doctrine has taken on added importance since the decision in *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (extending the special relationship doctrine by holding that a psychotherapist, because of a special relationship with his patient, has a duty to warn a third party of anticipated danger). See *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984); *Davidson v. City of Westminster*, 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982); see also RESTATEMENT (SECOND) OF TORTS § 320 and Comment d.

153. See *Peterson*, 36 Cal. 3d at 806-07, 685 P.2d at 1196-97, 205 Cal. Rptr. at 845-46; *Rodriguez II*, 186 Cal. App. 3d at 715, 230 Cal. Rptr. at 827; see also *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 470 P.2d 360, 87 Cal. Rptr. 376 (1970).

For another application of this doctrine, see *Phyllis P. v. Superior Court*, 183 Cal. App. 3d 1193, 228 Cal. Rptr. 776 (1986), where a California appellate court applied the special relationship doctrine to hold the Claremont Unified School District liable in a suit for intentional and negligent infliction of emotional distress.

154. *Rodriguez I*, 199 Cal. Rptr. 524 (1984); *Rodriguez II*, 186 Cal. App. 3d 707, 230 Cal. Rptr. 823 (1986).

155. 199 Cal. Rptr. at 526; 186 Cal. App. 3d at 711, 230 Cal. Rptr. at 824.

156. *Id.* at 528, 529.

157. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984).

158. 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).

159. CAL. CIV. PRO. R. CODE § 29.4 (West 1982).

tions to reconsider the decision.¹⁶⁰

Upon reconsideration, the court again ruled for the defendant school district, but departed from its approach in *Rodriguez I* and found that a special relationship did exist between the Inglewood School District and the injured student which was sufficient to give rise to a higher duty of care.¹⁶¹ A key feature in this new analysis by the *Rodriguez II* court was a close examination of article I, section 28(c) for its possible impact.¹⁶²

The facts in *Lopez* were central to this inquiry. Carmen Lopez and four other individuals brought an action against the Southern California Rapid Transit District (RTD) for injuries they had received after a "violent physical fight" broke out on an RTD bus.¹⁶³ A "violent argument" had ensued after a group of juveniles began harassing other passengers, but the bus driver apparently made no attempt to intervene.¹⁶⁴ Plaintiffs alleged that they were injured "as a direct and proximate result of RTD's negligence."¹⁶⁵ The California Supreme Court, ruling for the plaintiffs, found that certain "characteristics of public transportation," along with the statutory obligation imposed by Civil Code section 2100,¹⁶⁶ provided a "more than ample basis for finding a special relationship between common carriers and their passengers."¹⁶⁷ Similarly, the *Rodriguez II* court argued, certain characteristics of public education, along with the obligations of article I, section 28(c) and other legislative enactments,¹⁶⁸ lead to a special relationship between a school district and its students "so as to impose an affirmative duty on the district to take all reasonable steps to protect its students."¹⁶⁹

160. 186 Cal. App. 3d at 710, 230 Cal. Rptr. at 824: "We are instructed on retransfer to reconsider our prior opinion in this case in the light of the expanded vistas of governmental tort liability set forth in *Peterson* and *Lopez*."

For an overview of the relatively new concept of retransfer, see C. CLANCY, CALIFORNIA CIVIL APPELLATE PRACTICE § 22.30 (CEB, 2d ed. 1985).

161. 186 Cal. App. 3d at 710, 230 Cal. Rptr. at 824.

162. See *id.* at 714-16, 230 Cal. Rptr. at 826-28.

163. 40 Cal. 3d at 784, 710 P.2d at 908, 221 Cal. Rptr. at 841.

164. *Id.*

165. *Id.*

166. "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." CAL. CIV. CODE § 2100 (West 1982).

167. 40 Cal. 3d at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845.

168. 186 Cal. App. 3d at 714-15, 230 Cal. Rptr. at 826-27. The court refers to section 627 of the California Penal Code and section 32361 of the California Education Code. For a detailed description of these and other recent enactments, see *supra* note 108.

169. 186 Cal. App. 3d at 715, 230 Cal. Rptr. at 827.

Although the decision in *Rodriguez II* ultimately turned on the issue of government tort liability under California Government Code Section 815.6,¹⁷⁰ an injured plaintiff could conceivably rely upon the *Rodriguez II* language to show that under article I, section 28(c), a school district now has a higher duty of care in all cases.¹⁷¹ This interpretation would be improper, however, not only because the analogy to *Lopez* is incorrect, but because recent holdings under the special relationship doctrine all reflect a case-by-case analysis of pertinent factors.

The reasoning in *Rodriguez II* is inappropriate to the extent that it is based on an analogy to *Lopez*.¹⁷² The *Rodriguez II* court, like the trial court in *Hosemann*,¹⁷³ compared a student's situation in the public schools to a passenger's environment on a public bus.¹⁷⁴ Yet the situation in *Lopez* is not at all analogous to a school setting. Rarely are students forced into situations that are similar to rush hour on RTD buses. School grounds have much more open space, and students have a significant amount of freedom to move around. In addition, the decision in *Lopez* was based on the special relationship between common carriers and passengers. By contrast, courts generally do not treat schools the same as common carriers under the special relationship doctrine.¹⁷⁵

The most recent California Supreme Court decision on the application of the special relationship doctrine in a school setting is *Peterson v. San Francisco Community College District*.¹⁷⁶ Kathleen Peterson, a student at City College of San Francisco, was assaulted by an unidentified male while she was ascending a stairway in the school's parking lot. The assailant, who attempted to rape Ms. Peterson, had jumped out from what the plaintiff claimed were "unreasonably thick and untrimmed foliage and trees" adjoining the stairway. The assailant used a *modus operandi* which was similar to that used in previous attacks on the same stairway, attacks that the defendants had been aware of and had taken

170. CAL. GOV'T CODE § 815.6 (West 1980).

171. Once this duty is established, the plaintiff could argue the statutory liability issue, which the court in *Rodriguez II* indicated was still an open question—since article I, section 28(c) was held not to apply retroactively. See *Rodriguez II*, 186 Cal. App. 3d at 722, 230 Cal. Rptr. at 832. See also *supra* notes 35-38 and accompanying text.

172. The pertinent language in *Lopez*, discussing bus passengers but arguably describing public school students, reads as follows: "Large numbers . . . are forced into very close physical contact with one another under conditions that often are crowded, noisy, and overheated. At the same time, the means of entering and exiting the bus are . . . under the exclusive control of the bus driver." 40 Cal. 3d at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845.

173. *Hosemann*, *supra* note 5.

174. *Id.* at 27 ("Students and staff deserve no less a degree of care from the school districts.").

175. See *infra* notes 176-180 and accompanying text.

176. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984).

steps to prevent.¹⁷⁷

A notable difference between *Peterson* and *Lopez* is the description of the relevant duties. While the court in *Lopez* held that Civil Code section 2100 imposes upon common carriers "a duty of utmost care and diligence," the *Peterson* court reiterated that California law imposes upon school districts an apparently much less demanding duty: to supervise, conduct, and enforce rules and regulations.¹⁷⁸ In addition, the *Peterson* court looked to the special relationship between a possessor of land and members of the public who enter in response to a landowner's invitation, *not* the relationship between schools and pupils, in finding the college liable for the assault.¹⁷⁹

Peterson leads to the conclusion that the court has found the school district-pupil relationship to be a less potent vehicle for assigning liability. If it is not as powerful as the "possessor of land-member of the public" relationship, it is certainly not as powerful as the common carrier-passenger relationship, which has traditionally given rise to the "highest" duty of care under the special relationship doctrine.¹⁸⁰

Even if the *Lopez* analogy in *Rodriguez II* is correct, the language regarding higher duty would be applicable only to a similar fact pattern where a district, aware that a particular high school has a "long history" of similar violent assaults, fails to take measures to protect its students from attacks by non-students on school grounds.

A duty to act does not automatically arise simply because a relationship has been established. Liability is determined on a case-by-case basis in all recent California Supreme Court cases involving the special relationship doctrine.¹⁸¹ The courts look at a series of "pertinent factors" *in each instance* to determine whether the relationship is *sufficient* to give rise to a duty of care.¹⁸² Among these factors are (1) foreseeability of

177. *Id.* at 805, 685 P.2d at 1195, 205 Cal. Rptr. at 844.

178. *See id.* at 806 n.3, 685 P.2d at 1196 n.3, 205 Cal. Rptr. at 845 n.3 (quoting *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970)).

179. *Id.* at 808-09, 685 P.2d at 1196-97, 205 Cal. Rptr. at 846-47.

180. *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 209 (5th ed. 1984) ("[A] substantial number of courts [instruct] the jury in terms of a higher, or the highest, degree of care . . . in the case of the common carrier. They thus purport to recognize a higher or lower basic standard of conduct for different defendants."); *see also Lopez*, 40 Cal. 3d at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845 ("Indeed, the special relationship between a carrier and its passengers is even greater than that between other types of businesses and their customers.").

181. *See infra* notes 182-186 and accompanying text.

182. *See Davidson v. City of Westminster*, 32 Cal. 3d 197, 203, 649 P.2d 894, 897, 185 Cal. Rptr. 252, 255 (1982) (where the pertinent factors are listed as guides to consider "in determining the existence of a duty of care *in a given case*") (emphasis added). *See also Peterson*, 36

harm to the plaintiff, (2) extent of the burden to the defendant, (3) consequences to the community of imposing liability, (4) extent of the agency's powers (if a public agency is involved), and (5) limitations imposed upon the agency by budget.¹⁸³

These factors, especially foreseeability and public policy,¹⁸⁴ have been emphasized by the California courts in recent decisions on liability in a school setting based upon the special relationship doctrine. In *Peterson*,¹⁸⁵ the court stressed the importance of the foreseeability factor and the clear indication that the duty to act in the particular fact situation would not place an intolerable burden on the defendant. Recent appellate cases have relied upon the same pertinent factors in deciding whether the special relationship between school district and pupil gave rise to a higher duty of care.¹⁸⁶

The court in *Rodriguez II*¹⁸⁷ appears to adopt this case-by-case approach in its own analysis, expressly stating that "[w]hether a relationship is determined to be special for the purpose of imposing an affirmative duty will depend on a variety of factors not yet fully defined and, to no small extent, on important policy considerations."¹⁸⁸ Thus the *Rodriguez II* decision does not support the position that a special relationship between school district and student gives rise to a higher duty of

Cal. 3d at 806, 685 P.2d at 1196, 205 Cal. Rptr. at 845, which lists these same key "pertinent factors" (originally outlined in *Rowland v. Christian*, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968)).

183. *Peterson*, 36 Cal. 3d at 806, 685 P.2d at 1196, 205 Cal. Rptr. at 845. Additional "pertinent factors" for determining whether or not the relationship gives rise to a duty to act include closeness of connection between defendant's conduct and the injury suffered, moral blame attached to the defendant's conduct, and policy of preventing future harm. *Id.*

184. Pertinent factors relating to "public policy" include moral blame, policy of preventing future harm, extent of burden, consequences to the community of imposing liability, the extent of the agency's powers, and the limitations imposed by budget. *See Peterson*, 36 Cal. 3d at 806, 685 P.2d at 1196, 205 Cal. Rptr. at 845.

185. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984).

186. *See Searcy v. Hemet Unified School Dist.*, 177 Cal. App. 3d 792, 223 Cal. Rptr. 206 (1986); *see also Rodriguez I*, 199 Cal. Rptr. 524 (1984). The *Lopez* court, too, relied heavily on several of these key pertinent factors. The court spent much time discussing preventive measures that might have been taken without imposing "a colossal financial burden on the district" (thus dealing with several of the public policy factors). 40 Cal. 3d at 787-88, 710 P.2d at 910, 221 Cal. Rptr. at 844. Emphasis was placed on the fact that if trouble arises, the passengers are "wholly dependent on the bus driver to summon help or provide a means of escape" (thus examining the closeness of connection between defendant's conduct and the injury suffered). *Id.* at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845. Additionally, the liability itself is imposed "only where . . . the carrier has or should have knowledge from which it may reasonably be apprehended that an assault . . . may occur" [thus stressing the importance of foreseeability]. *Id.* at 791, 710 P.2d at 914, 221 Cal. Rptr. at 847.

187. 186 Cal. App. 3d 707, 230 Cal. Rptr. 823 (1986).

188. *Id.* (emphasis added).

care in every case because of article I, section 28(c). The approach of the California Supreme Court in *Lopez, Peterson*,¹⁸⁹ and *Davidson*¹⁹⁰ still controls, and the key pertinent factors must be considered in light of each particular fact situation.

2. *A Higher Standard of Care in the School Setting*

Another method for establishing a higher duty under existing tort law would be to hold that article I, section 28(c) prescribes a higher standard of care for school officials. Currently, California law requires that teachers and administrators exercise only the amount of care that "a person of ordinary prudence, charged with [the officials' duties of supervision], would exercise under the same circumstances."¹⁹¹ Under this interpretation of article I, section 28(c), though, school officials would be held to the same higher standard of care as other "professional" persons.

The professional standard requires the exercise of care which is "reasonable in light of . . . superior learning and experience, and any special skills, knowledge or training [that teachers and administrators] may personally have over and above what is normally possessed by persons in the field."¹⁹² Under this higher standard, California teachers and administrators would likely become more assertive regarding school safety.

This strategy for providing safer schools is flawed, however, because the "profession" of which teachers and administrators are members is *education*, not crime prevention or law enforcement. An analysis of the professional standard's language indicates that it is not suited to the problem of campus safety. The "superior learning and experience" of educators is rooted in a mastery of subject matter and teaching methodology. Any "special skills, knowledge, or training," above and beyond subject matter and methodology, would most likely be in educational psychology, where an understanding of human behavior and interaction can help facilitate success in the affective domain as well as in the cognitive and psychomotor areas.¹⁹³ Educators are entrusted with keeping or-

189. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984).

190. 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

191. *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 747, 470 P.2d 360, 363, 87 Cal. Rptr. 376, 379 (1970). See also *Pirkle v. Oakdale Union Grammar School Dist.*, 40 Cal.2d 207, 210, 253 P.2d 1, 2 (1953); see generally RESTATEMENT (SECOND) OF TORTS § 320 (1965) (duty of one having custody of another).

192. See W. PROSSER, THE LAW OF TORTS § 32, at 185-89 (5th ed. 1984).

193. See generally M. KOURILSKY & L. QUARANTA, EFFECTIVE TEACHING: PRINCIPLES & PRACTICE (1987).

"Experiences in school and personal learning are not limited to the cognitive domain [which involves intellectual processes]. In the affective domain are attitudes, feelings, emotions

der on school grounds, and many have "special skills, knowledge and training" in methods of behavior modification. Yet neither teachers nor administrators are trained to be policemen.¹⁹⁴

In recent years, litigators have attempted to define a standard of care for educators. The courts have not looked kindly on these so-called "educational malpractice" cases,¹⁹⁵ for reasons which include "the absence of a *workable* rule of care against which defendant's conduct may be measured."¹⁹⁶ As Judge Jasen stated in *Donohue v. Copiague Union Free School District*:¹⁹⁷

To entertain a cause of action for 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of these policies.¹⁹⁸

Although a standard of care in the educational malpractice context is arguably different from a professional standard that would incorporate supervisory skills necessary to keep schools safe, the same concerns are likely to apply. The management skills of teachers and administrators are often so intertwined with educational techniques in general that the courts would need to make the same types of "judgments as to the validity of broad educational policies" that the *Donohue* court refused to make.¹⁹⁹

and moral characteristics. . . . The third category . . . is the psychomotor domain, which refers to bodily movements and bodily control." *Id* at 6, 7.

194. See e.g. UCLA TEACHER EDUCATION MANUAL 1987-1988, UCLA Graduate School of Education (copies of the manual may be obtained by writing to the UCLA Teacher Education Laboratory, 220 Moore Hall, Los Angeles, CA 90024); see generally *A Special Issue: Teachers, Teaching, and Teacher Education*, 56 HARV. EDUC. REV. 4 (1986).

195. See *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App. 3d 814, 826, 131 Cal. Rptr. 854, 862 (1976) ("the failure of educational achievement may not be characterized as an 'injury' within the meaning of tort law").

Recent California cases continue to follow *Peter W.* and find against the party alleging educational malpractice. See *Searcy v. Hemet Unified School Dist.*, 177 Cal. App. 3d 792, 805, 223 Cal. Rptr. 206, 213-14 (1986) (alleged failure to teach safety rules); *Keech v. Berkeley Unified School Dist.*, 162 Cal. App. 3d 464, 470, 210 Cal. Rptr. 7, 10 (1984) (alleged duty to provide special education).

196. *Hunter v. Board of Educ.*, 292 Md. 481, 485, 439 A.2d 582, 584 (1982) (emphasis added).

197. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

198. *Id.* at 444-45, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378 (emphasis added). See also K. ALEXANDER & M. ALEXANDER, *supra* note 25, at 481-82.

199. 47 N.Y.2d at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378. It should be noted that prescribing a standard of care which makes it easier to hold teachers liable for "educational malpractice" and/or "failure to prevent crime" could very well result in even less college graduates enrolling in teacher credential programs at a time when there is already a dangerous

Thus, there are several good reasons behind the courts' inability to develop a "workable" professional standard of care for educators. The alleged mandate of article I, section 28(c) does not provide the means for overcoming precedent in this regard.

3. *Injunctive Relief as an Additional Remedy*

Under another interpretation, article I, section 28(c) would allow students and school personnel to use either a mandatory or prohibitory injunction to enforce their right to safe schools. Currently, injunctive relief is very difficult to obtain in the area of torts relating to school campuses. Threatened assault and battery, for example, which comes up often in a school setting, is generally not enjoined.²⁰⁰ Trespass may be enjoined to protect against outside intruders, but a recurring harm and/or the prospect of irreparable injury must be shown before the remedy is granted.²⁰¹ Personal injury in general is rarely enjoined because a high probability of recurrence must be shown for the legal remedy to be held inadequate.²⁰²

If violations of the constitutional right to safe schools are alleged, however, the courts would be more likely to grant an injunction. As Professor Dobbs notes, "relief by way of injunction can now be obtained for the protection of personal rights, so long as there is a need for such protection and no reason of policy prevents it."²⁰³ By obtaining temporary restraining orders and then preliminary injunctions, potential victims could act quickly to prevent threatened assaults and batteries and any anticipated negligence.

Although it can be argued that the voters approved article I, section 28(c) because they recognized a need for the protection afforded by an injunction, the application of this form of remedy in a school setting raises key policy concerns. First, the feasibility of an injunction designed

shortage of qualified applicants. The teaching profession will become an even less attractive alternative if educators become more vulnerable to lawsuits.

For an overview of the recruitment problem, see *A Nation Prepared: Teachers for the Twenty-first Century, The Report of the Task Force on Teaching as a Profession*, May 1986, at 26-32 (commonly known as "The Carnegie Report"). See also *infra* notes 253-270 and accompanying text.

200. There are two reasons why the courts will not usually enjoin threatened assault and battery: (1) Equity will not generally enjoin the commission of a crime, and (2) such injunctions are usually regarded as not very effective. See generally D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 115-20 (injunctions against crimes), 536-38 (threatened assault and battery) (1973).

201. See CAL. CIV. PROC. CODE § 526(2), (6) (West 1979).

202. *Id.*

203. D. DOBBS, *supra* note 200, at 113 (emphasis added).

to prevent acts such as threatened assaults or batteries is questionable. Dobbs indicates that the courts have refrained from granting injunctive relief in this context simply because the practical effect is so minimal.²⁰⁴ An order prohibiting one student from coming in contact with another, for example, would be very difficult to enforce. An order could require that the student be suspended or even expelled, but the resulting interference with the day-to-day policies of the school goes far beyond what the courts have been willing to do in the past.²⁰⁵

Second, injunctions could place an unreasonable burden on the schools. Aggressive plaintiffs might not only seek to expel innocent students but to secure injunctions which would require schools to implement security measures of dubious value, such as metal detectors at school entrances and/or an increased number of armed guards. Energies and additional funds could be diverted from educational programs, possibly resulting in schools that are even less conducive to learning than they are now.²⁰⁶

Third, the availability of injunctive relief might increase the caseload in an already overburdened court system. This interpretation could open the door to unreasonable requests for temporary restraining orders that might only clog the courts and force teachers, school administrators, and district personnel to spend valuable time fighting legal battles.

The interpretation that article I, section 28(c) provides for expanded duties and/or additional remedies under current tort doctrines is an inappropriate application of the Safe Schools Provision. Not only does it impose unrealistic obligations on the schools, but it is out of step with both California case law and traditional tort principles.

E. Affirmative Duty to Make Schools Safe

The most liberal interpretation of the Safe Schools Provision is that it creates a new, affirmative duty to make schools safe no matter what the cost. This aggressive position has been adopted by the court in

204. *Id.* at 115.

205. See e.g., *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 445, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979). In *Donohue*, the court was not at all willing "to sit in review of the day-to-day implementation of [school] policies." *Id.* See generally T. Loscalzo, *Liability for Malpractice in Education*, 14 J. OF L. & EDUC. 595, 606 (1985) (In discussing the public policy considerations which have precluded the courts from recognizing educational malpractice as a cause of action, "... cited as tantamount in importance is the impact of ... the disruption of the educational process. ...").

206. See *infra* notes 249-272 and accompanying text.

Hosemann,²⁰⁷ and, if upheld, could have a substantial impact on the California public schools.

It appears that Stephen Hosemann has had no direct personal contact with assailant Edward Hardy since the assault at Montera Junior High. Yet he continued to fear further attacks by Hardy throughout his years at Skyline High School.

Hosemann's fears might have been unjustified. Although he had experienced three negative incidents with Hardy (the theft of his wallet in 1981, a "confrontation" at the bus loading area in 1981-82, and the physical assault in 1983), these events had occurred years earlier on a different campus. On the other hand, Hardy's record throughout these years was decidedly uneven. Not only did he become involved in a fight with two other Skyline students in late 1984 and reportedly make at least one other unauthorized appearance on campus, but he has in fact been committed to Los Cerros Juvenile Camp on two separate occasions. In addition, Hardy knew that he was suspended from school in 1981 because Hosemann reported the theft of the wallet, and he undoubtedly was aware that Mrs. Hosemann, through a series of letters, phone calls, and legal actions, had succeeded in keeping him out of the school he wanted to attend.

Even if Hosemann's fears were justified, the Oakland School District's culpability in this regard is questionable. Hosemann did attend the district's most prestigious high school, a top academic campus in an affluent hilltop neighborhood, for three years, without incident. Judge Bartalini, however, in a decision reflecting "the remarkable scope of a declaratory relief action under California Code of Civil Procedure section 1060,"²⁰⁸ applied the above facts and concluded that "[s]hould any

207. See *supra* note 5.

208. 5 B. WITKIN, CALIFORNIA PROCEDURE 243-45 (3d. ed. 1985). Although declaratory relief is generally available only when an actual controversy exists, "an issue will usually be deemed justiciable if a coercive cause of action has already accrued to one of the parties." *Developments in the Law—Declaratory Judgments*, 62 HARV. L. REV. 787, 794 (1949). Thus, because Edward Hardy actually assaulted Hosemann on the Montera Junior High campus in 1983 (and a coercive cause of action apparently has already accrued), the case is an appropriate one for declaratory relief, unlike *People ex rel. George Deukmejian v. Los Angeles Unified School Dist.*, No. 64340 (Cal. App., 2d Dist., Jan. 25, 1983). In *Deukmejian*, the appellate court held that a cause of action based on the rationale that "existing procedures have not solved the problem of criminal activity on public school campuses" was not "the proper subject of declaratory relief." The subject of the case was deemed to be only "of broad general interest," with "the absence of a true justiciable controversy." *Id.* at 10 (quoting in part *Winter v. Gnaizda*, 90 Cal. App. 3d 750, 756, 152 Cal. Rptr. 700, 704 (1979)).

Arguably, however, the facts surrounding the *Hosemann* decision suggest the need for a modification of the rules governing the scope of declaratory relief. The plaintiff had had no personal contact with his former assailant since their junior high days. He was about to gradu-

school district fail to discharge its *duty to make schools safe*, or fail to use *reasonable diligence to discharge that duty*, a student or staff member may recover damages if he or she is injured as a legal result of the school district's failure."²⁰⁹

Although the parameters of this affirmative duty are still unclear, the trial court stated that "a student or staff member need not resort to the customary theory of negligence to recover compensatory damages for a violation of his or her constitutional right to a safe school."²¹⁰ The court described the duty as an absolute obligation "to make schools safe" and declared "that the intent of the voters was to *create* school campuses free of crime and violence."²¹¹ In another part of the opinion, however, the court appeared to retreat from this "all-or-nothing" position when it declared that the district's affirmative duty is only "to take reasonable steps to protect its students and staff," and only "once the school district has knowledge of crime and violence on the school campus."²¹²

What is clear, though, is that in *Hosemann*, (1) the court "imposed an affirmative duty on school districts to implement plans designed to alleviate crime and violence on school campuses,"²¹³ (2) the judge determined that article I, section 28(c) affords a new cause of action for damages, and both school districts and private individuals may be held liable for violations of this constitutional right,²¹⁴ and (3) the potential cost to the schools is deemed irrelevant, since "denying a constitutional right on

ate from the district's best academic campus. The "actual controversy" stemmed only from an apparently insignificant fight between two young boys, with no evidence of any type of injury . . . the kind of minor skirmish that has occurred from time immemorial. The trial court, however, after studying these events, ordered the Oakland School District "to make the schools safe," no matter what the cost. *Hoseman, supra* note 5, at 28, 36.

209. *Hosemann, supra* note 5, at 36 (emphasis added). It is interesting to note that the judge's position in this case is virtually identical to that espoused by Ms. Sawyer in her 1983 Pacific Law Journal article. See Sawyer, *supra* note 17. In fact, the judge actually thanks her, George Nicholson, and the Pacific Legal Foundation (whose attorneys filed an amicus curiae brief) by name.

210. *Hosemann, supra* note 5, at 36.

211. *Id.* at 20 (emphasis added).

212. *Id.* at 27.

213. *Id.* at 36. The judge has retained jurisdiction so that he can require the Oakland School District to reappear and inform the court "of specific steps it has taken to satisfy the mandate of Section 28(c)." *Id.* at 37.

It should be noted that the trial court decision in *Hosemann* has no precedential value whatsoever. See generally H. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS (1912).

214. *Hosemann, supra* note 5, at 37. Arguably, if this decision is upheld, article I, section 28(c) could (also) be applied to satisfy the statutory liability analysis under section 815.6 of the

the grounds of inadequate resources cannot be justified."²¹⁵

The *Hosemann* decision is incorrect and should be overturned. Not only does it ask the schools to do something that is manifestly impossible, but it is inconsistent with California case law²¹⁶ and ignores important public policy considerations.²¹⁷

1. *The Duty to "Make Schools Safe"*

All of us want to walk on safe streets, live in safe cities, and raise our children in a safe environment. In spite of all the progress we have made throughout the centuries, however, the world today is arguably not any safer than it was before. Much has been written about the great technological advances that have brought with them so many new dangers and risks.²¹⁸ In addition, people continue to threaten each other and prey on each other just as they did thousands of years ago. Weapons might be different, but motives do not seem to have changed.

Safety continues to be a matter of degree.²¹⁹ Although people today exhibit "widely diverse value judgments about threats to the quality of public health, safety, and the environment,"²²⁰ most people realize that "[s]ome kinds of risks are associated with *all* human activities, *including* . . . education."²²¹ Most realize that things can be made "safer", but that life cannot ever be regulated to achieve "perfect safety."²²²

Even if extreme, intrusive security measures are instituted in the public schools, and, somehow, all drugs and weapons are kept out,²²³ neither drug abuse nor assault and battery would be prevented. Drugs could still be exchanged and ingested off campus, and students could still use their hands to fight. It is certainly possible to make schools *safer*,

California Government Code. See *Rodriguez II*, 186 Cal. App. 3d 707, 230 Cal. Rptr. 823 (1986).

See also *Tirpak v. Los Angeles Unified School Dist.*, 232 Cal. Rptr. 61 (1986), for a clear description of the three-prong test to ascertain whether or not liability might be imposed under any "enactment" in a school setting.

215. *Hosemann*, *supra* note 5, at 28.

216. See *infra* notes 225-244 and accompanying text.

217. See *infra* notes 245-273 and accompanying text.

218. See generally M. DOUGLAS & A. WILDAVSKY, *RISK AND CULTURE* (1982).

219. See generally *REGULATORY REFORM* (M. Maxey & R. Kuhn, eds. 1985).

220. *Id.* at 4.

221. Zebroski, *The Uses of Risk Assessment in Regulation and Self-Regulation*, in *REGULATORY REFORM*, *supra* note 218, at 131 (emphasis added); see also McGarity, *Risk Assessment and Public Trust: The Role of the University*, in *REGULATORY REFORM*, *supra* note 219, at 125 ("If 'Joe Citizen' expects regulators to make the world risk-free, then he will inevitably be disappointed.").

222. See *REGULATORY REFORM*, *supra* note 219, at 5.

223. Arguably, only highly extreme and totally unreasonable measures such as daily strip searches at the school gates would keep all drugs and weapons off school grounds.

but public schools will always be a reflection of our society. It is not possible to make the schools safe for the same reasons that it is not possible to make the world safe.

2. California Case Precedent

a. Schools as "Insurers of Safety"

Courts have recognized that there are limits to what the school districts are able to do to safeguard students.²²⁴ In fact, "school districts and their employees have never been considered insurers of the physical safety of their students."²²⁵

The court of appeal in *Rodriguez I*²²⁶ found "no precedent to require the school district to be guarantors of protection from all harm."²²⁷ Decisions throughout the country have followed this principle.²²⁸ The *Hosemann* court's²²⁹ use of the words "assure safe schools" and its demand that schools be made safe no matter what the cost lead to the conclusion that this trial court has chosen to ignore a clearly established rule of law.²³⁰

b. The Broad, Sweeping Changes Urged by Proponents of Proposition 8

The California courts have been unwilling to interpret Proposition 8 so as to grant the broad, sweeping changes urged by its proponents. Although the initiative was given a grand title—"The Victims' Bill of Rights"—and was widely proclaimed to be a landmark in the fight

224. See e.g., *Bartell v. Palos Verdes Peninsula School Dist.*, 83 Cal. App. 3d 492, 498, 500, 147 Cal. Rptr. 898, 901 (1978).

225. *Id.* at 498, 147 Cal. Rptr. at 901.

226. 199 Cal. Rptr. 524 (1984).

227. *Id.* at 528.

228. See e.g., *Broward County School Bd. v. Ruiz*, 493 So. 2d 474, 11 Fla. Law W. 1476 (Fla. App. 1986); *Cavello v. Sherburne-Earlville Cent. School Dist.*, 110 A.D.2d 253, 494 N.Y.S.2d 466 (1985), *Passafaro v. Board of Educ.*, 43 A.D.2d 918, 353 N.Y.S.2d 178 (1974).

229. *Hosemann*, *supra* note 5, at 27.

230. The trial court's declaration is very much akin to strict liability. Recent cases and statutes show "a very marked tendency to extend strict liability into new fields." In this regard, the *Hosemann* decision would be consistent with the modern trend. W. PROSSER, *supra* note 25, at 582-83

However, the law is well-settled that a defendant "may be regarded as so engaged in the rendition of such an *essential public service* as to justify an exception to strict liability. It is generally held that the rules of strict liability do not apply if the activity is carried out in pursuance of a public duty." W. PROSSER & W. KEETON, *supra* note 25, § 79, at 567-68. See also RESTATEMENT (SECOND) OF TORTS § 321 (1965).

Thus, if *Hosemann* is imposing strict liability, the schools, performing an essential public service on an ongoing basis, arguably can challenge the decision on the ground that it ignores the well-established public duty exception to the strict liability doctrine.

against crime,²³¹ the cases exhibit a clear trend toward sustaining "limiting" interpretations of the various provisions.

Subdivision (d), for example ("Right to Truth-in-Evidence"), was seen by some as the vehicle for completely removing the controversial "exclusionary rules" from California law.²³² Article I, section 28(d) provides that "all relevant evidence shall not be excluded in any criminal proceeding."²³³ Yet *In re Lance W.*,²³⁴ the 1985 California Supreme Court case that upheld the application of subdivision (d) to admit relevant evidence, included several caveats regarding the extent of its ruling. The court held that article I, section 28(d) abrogated both California's 'vicarious exclusionary rule' and a defendant's right to object to the introduction of evidence seized in violation of article I, section 13 (under independent state grounds).²³⁵ The court cautioned, however, that it has not addressed "the question of whether section 28(d) mandates admission of evidence obtained in violation of other constitutional provisions."²³⁶ In addition, it expressly stated that "whether or to what extent Proposition 8 entails a broader sweep is not a question we need to decide here."²³⁷ Thus, although certain evidence that California courts had once excluded will now be admissible, many of the so-called California exclusionary rules still remain in effect.²³⁸

231. Co-author George Nicholson called Proposition 8 "the most effective anticrime program ever proposed to help the forgotten victims of crime." *Brosnahan v. Brown*, 32 Cal. 3d 236, 306 app., 651 P.2d 274, 320 app., 186 Cal. Rptr. 30, 76 app. (1982) (rebuttal to argument against Proposition 8).

232. The exclusion of evidence under California law is not based on one rule alone. There are, in fact, a large variety of so-called "exclusionary rules," based on statutes, cases and the California Constitution. In California, before Proposition 8, evidence could be excluded under article I, section 13 (guarantee against unreasonable searches and seizures), article I, section 1 (right to privacy), article I, section 15 (self-incrimination privilege), various statutory exclusionary rules under the penal, government, and evidence codes, and certain judicially-created rules. See generally J. CHRISTIANSEN, PROPOSITION 8: A THREE-YEAR RETROSPECTIVE 12-27 (CEB Program Booklet, Aug. 1985).

233. CAL. CONST. art. 1, § 28(d).

234. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

235. *Id.* at 879, 694 P.2d at 747, 210 Cal. Rptr. at 634.

236. *Id.* at 885 n.4, 694 P.2d at 751, 210 Cal. Rptr. at 638.

237. *Id.* at 887 n.7, 694 P.2d at 753 n.7, 210 Cal. Rptr. at 640 n.7.

238. *Id.* at 888, 694 P.2d at 753, 210 Cal. Rptr. at 640. In addition, it should be noted that the federal exclusionary rule remains in force, and California courts must continue to exclude evidence obtained in violation of the Fourth Amendment of the United States Constitution. *Id.*

One so-called "exclusionary rule" in California is Evidence Code section 940, the privilege against self-incrimination. In the recent case of *People v. May*, 43 Cal. 3d 344, 729 P.2d 778, 233 Cal. Rptr. 344 (1987), the California Supreme Court ruled that subdivision (d) could not be applied to allow self-incriminating statements, obtained in violation of the *Miranda* decision, to be used for impeachment purposes at trial. Justice Mosk, writing for the majority in *May*, declared that the language of article I, section 28(d) created an exception for all evi-

Similar limits have been placed on the language of subdivision (f) ("Use of Prior Convictions"). In *People v. Castro*,²³⁹ the majority concluded that the trial court in a post-Proposition 8 case retains discretion to exclude prior convictions when their impeachment value is outweighed by their prejudicial effect.²⁴⁰ In *People v. Valentine*,²⁴¹ the court found that although the second sentence of section 28(f)²⁴² eliminates the judicially created rule denying the jury all knowledge that defendant is an ex-felon,²⁴³ if defendant stipulates to ex-felon status, evidence of the nature of his prior conviction may still be withheld.²⁴⁴

In *Hosemann*, the trial court seeks to interpret section 28(c) as providing for the broad, sweeping changes that the proponents of Proposition 8 appear to desire. Yet subdivisions (d) and (f) of the same proposition have already been given limiting interpretations. The *Hosemann* decision represents a significant departure from the clear trend that has emerged in cases construing the application of article I, section 28.

3. Public Policy Considerations

Recent California cases dealing with injuries on school grounds have stressed the importance of public policy considerations. In *Peterson*,²⁴⁵ for example, the court focused on the policy of preventing future harm, the extent of burden on the defendant, the consequences to the community of imposing liability, the extent of the agency's powers, and the limi-

dence covered by the constitutional privilege against self-incrimination by providing that "[n]othing in this section shall affect any existing statutory rule of evidence relating to privilege." *Id.*

But see *Court's Rehearing Could Find Mosk Being Reversed*, L.A. Daily Journal, July 3, 1987, § 1, at 1, col. 2 (describing the California Supreme Court's decision to rehear *People v. May*, and the possibility of a different result now that three of the judges who voted for the defendant have been removed from office).

239. 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985).

240. *Id.* Since the majority had concluded that subdivision (d) applies California Evidence Code section 352 to subdivision (f), the trial court was deemed to have continued discretion to exclude priors, "even though the first sentence of section 28(f) states that priors shall be used 'without limitation' for impeachment. See *People v. Valentine*, 42 Cal. 3d 170, 177, 710 P.2d 913, 228 Cal. Rptr. 25 (1986).

For an excellent discussion of *Castro* and some creative suggestions regarding the interpretation of the entire "Victims' Bill of Rights," see Note, *Proposition 8 and the California Supreme Court: Interpretation Run Riot*, 60 S. CAL. L. REV. 540 (1987).

241. 42 Cal. 3d 170, 720 P.2d 913, 228 Cal. Rptr. 25 (1986).

242. Article I, section 28(f) of the California Constitution provides in pertinent part: "When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."

243. See *People v. Hall*, 28 Cal. 3d 143, 616 P.2d 826, 167 Cal. Rptr. 844 (1980).

244. 42 Cal. 3d at 177, 720 P.2d at 916-17, 228 Cal. Rptr. at 28-29.

245. 36 Cal. 3d 799, 685 P.2d. 1193, 205 Cal. Rptr. 842 (1984).

tations imposed by budget.²⁴⁶ The San Francisco Community College District was ultimately held liable because the court felt that similar assaults could be prevented if the school, after being notified of previous attempted crimes, simply trimmed the bushes and provided more light in the parking area.²⁴⁷

In *Rodriguez I*,²⁴⁸ the public policy analysis was also a major rationale behind the court's decision. "Policy considerations weigh against imposing duty," the court stated in a sub-heading,²⁴⁹ holding that a student injured by a non-student on school grounds could not recover from the school district for its failure to protect him. "Insuring such protection," the court reasoned, "*would impose a substantial financial burden on the school district, which operates on a limited budget.*"²⁵⁰

The trial court in *Hosemann*, however, declared that cost should not be considered a factor, boldly proclaiming that "[d]enying a constitutional right on the grounds of inadequate resources cannot be justified."²⁵¹ This analysis ignores the financial burden such a ruling would place upon already strapped school districts.²⁵²

The widely acclaimed *Commons Report*²⁵³ emphasizes the fact that we cannot afford to plan for changes in the public schools "regardless of costs." Money is shown to be both a major consideration and a major problem.²⁵⁴ In the 1983-84 school year, for example, California, once a national trend-setter in providing quality education, spent \$185 per pupil less than the United States average.²⁵⁵ Although that downward trend

246. See *supra* notes 182-186 and accompanying text.

247. 36 Cal. 3d at 814, 685 P.2d at 1202, 205 Cal. Rptr. at 850-51.

248. 199 Cal. Rptr. 524 (1984).

249. *Id.* at 529.

250. *Id.* (emphasis added).

251. *Hosemann*, *supra* note 5, at 28.

252. Professor Edwin L. Zebroski provides a historical perspective for this issue. "One of the dubious luxuries left over from the age of affluence," he writes, "is the concept that a risk-free society or a zero-risk ideal for some activities is a desirable and attainable social good, regardless of cost." Zebroski, *The Uses of Risk Assessment in Regulation and Self-Regulation*, in REGULATORY REFORM, *supra* note 220, at 134.

253. *Who Will Teach Our Children? A Strategy for Improving California's Schools, The Report of the California Commission on the Teaching Profession*, (Nov. 1985) [hereinafter *The Commons Commission Report*].

The Commons Commission was sponsored by the California Superintendent of Public Instruction and the Education Committees of both the State Senate and the State Assembly. It was chaired by Dorman L. Commons, a business consultant, and was composed of a "blue-ribbon panel" of educators, attorneys, and corporate consultants.

254. See *infra* notes 255-270 and accompanying text.

255. See *The Commons Commission Report*, *supra* note 253, at 44.

was reversed by the passage of Senate Bill 813²⁵⁶ in 1983, the commission reports that "more funding will be needed" because of projected increases in enrollment alone, not only "to keep pace in the future," but "to support critically needed improvements."²⁵⁷

Current projections for the 1987-88 school year indicate that the state education budget, "after four years of increase," is on "a backward slide."²⁵⁸ According to the director of PACE (Policy Analysis for California Education, a consortium of UC Berkeley, Stanford, and the University of Southern California), the total amount of money earmarked for education, even figuring in estimated lottery funds, falls short of the minimum total needed "*just to keep the education system fiscally even.*"²⁵⁹

The Commons Commission found that California ranked *fiftieth* in the nation in student-teacher ratio,²⁶⁰ that fully one-fourth of the California teachers surveyed did not have a textbook for every student,²⁶¹ and that, because of deferred maintenance, "many classrooms in California

256. Senate Bill 813, The Hughes-Hart Educational Reform Act of 1983, contained eighty-one provisions which are now included in various sections of the California Education Code. Forty-three of these provisions were mandated, while the other thirty-eight were permissive. Key changes included funding for increased instructional time (CAL. EDUC. CODE §§ 42238.7, 42238.8 (West Supp. 1987)), the establishment of the California Mentor Teacher Program (CAL. EDUC. CODE §§ 44490-44496 (West Supp. 1987)), increased requirements for minimum teacher salaries (CAL. EDUC. CODE § 45023.4 (West Supp. 1987)), and stiffer graduation requirements (CAL. EDUC. CODE §§ 51225-51225.3 (West Supp. 1987)).

257. *The Commons Commission Report*, *supra* note 253, at 44 ("Because of increased enrollments, expenditures for K-12 education must rise by about 59 percent by 1990 just to maintain the same level of real spending per student. Revenues for K-12 are projected to grow between 50 and 72 percent over this period. Unless new revenues are developed, there will not be enough funds to significantly improve education, and possibly not even enough to maintain the same level").

258. Odden, *Education Is Back on Short Rations*, L.A. Times, Jan. 27, 1987, § 2, at 5, col. 3. After much heated debate, "[Governor] Deukmejian vetoed about \$170 million in school funds from the budget sent to him by the . . . Legislature," thus providing only "\$330 million in new money for schools." L.A. Times, July 26, 1987, § 1, at 38, col. 4.

259. According to Professor Odden, "the minimum total [increase] needed just to keep the . . . system fiscally even without significant teacher salary increases" was \$654 million, and \$1 billion if teacher salaries were to rise. Odden, *supra* note 257, Jan. 27, 1987, § 2, at 5, col. 5. Yet the actual funding increase is apparently only \$611 million (a figure obtained by adding the state's \$330 million increase to Odden's estimated increase of \$281 million in local property tax revenue, *id.*, and not including any possible increase in lottery funds). See also *The Sinking Schools*, L.A. Times, July 27, 1987, § 2, at 4, col. 1 (pointing out that even with the fund increases of the mid-1980's, "the state has fallen . . . [back] . . . to 33rd in terms of spending per pupil, now about one-third the level of New York").

But see Brimelow, *Are We Spending Too Much on Education?*, FORBES, Dec. 29, 1986, at 72 (an indictment of the bureaucratic waste that arguably exists in the United States public schools and prevents Americans from getting a proper "return for their money").

260. *The Commons Commission Report*, *supra* note 253, at 26-27.

261. *Id.* at 28 ("The cost of an average science textbook today is \$17 each, yet the entire appropriation for materials per student per year in secondary schools is only \$12.").

will become totally unusable in the near future unless corrective measures are taken."²⁶² These problems must all be considered in light of predictions that "following a decade of falling enrollments, the public schools will grow by nearly 450,000 students."²⁶³

The most significant problem, however, according to the commission, is "Who Will Teach Our Children?" Good teachers can have a positive effect even with large classes, a shortage of instructional materials, and poor building facilities. Without good teachers, though, improvements in these other areas will have little, if any, effect on the quality of our educational program.²⁶⁴

Not only does California face a teacher shortage "whose true magnitude is not yet known,"²⁶⁵ but the teaching profession itself "is beset with problems."²⁶⁶ The commission stresses the importance of restructuring the career of teaching to attract top quality credential candidates and to keep our best people in the profession.²⁶⁷ A key recommendation is the adoption of a salary schedule that would make beginning teacher salaries competitive with other professions as well as restore lost purchasing power for career teachers. Over the past decade, the commission reports, "teachers' purchasing power has declined 15 percent. Not surprisingly, the recent Metropolitan Life Teacher Poll of teachers nationwide revealed that 'more than a quarter—mostly veteran teachers—reported they would leave teaching in the next five years. *Dissatisfaction with wages was the primary reason given.*' "²⁶⁸

262. *Id.* at 27 ("The state Department of Education has an inventory of the school system's maintenance backlog that calls for \$2 billion in maintenance and repair. Each year, California schools need an additional \$350 million statewide to keep existing facilities in good repair.").

263. *Id.* at 9. The Commons Commission has recommended the institution of "the quarter system for year-round use of the schools" both to conserve funds and to use existing facilities more efficiently. *Id.* at 27.

264. Although it is certainly true that a good teacher can "teach" a group of any reasonable size, under a tree, without any instructional materials, it must be emphasized that very few people will be able to do this for very long. See *id.* at 11, where the commission lists ten key reasons for low morale and a continuing exodus of top quality people from the teaching profession. Teachers today are faced with increased pressure to conduct quality educational programs, yet they are being asked to do this with fewer resources in an environment that is often even less conducive to learning than it has been in the recent past.

265. *Id.* at 37.

266. *Id.* at 11.

267. *Id.* at 11-12. The commission arrived at 27 recommendations in response to the question: "What will it take to attract, train, and retain enough good people in teaching?"

268. *Id.* at 39-40 (emphasis added). "In 1982-83, for example, California teachers had a median income of \$24,375, compared with a national median for all college-educated workers of \$41,000. Even adjusting for the difference between nine and twelve month salaries, California teachers make an average of \$10,000 less than their college classmates." *Id.* at 38.

The commission notes that although "California ranks seventh among states in average teacher salaries, when teachers' salaries are considered as a percentage of each state's total

It is apparent from these facts that public policy considerations preclude the courts from requiring the schools to do *anything* "regardless of costs." Not only is funding for public education difficult to obtain now, but more money will be needed if we wish to improve our schools in the future. Although many of the Commons Commission's recommendations can be implemented without additional funds,²⁶⁹ the report states very bluntly that "improving California's schools will not be cheap."²⁷⁰

A legal system that refuses to take our schools' financial status into consideration is at best frivolous and at worst totally irresponsible. Fortunately, California courts have not ignored this ongoing problem. The appellate court in *Bartell v. Palos Verdes Peninsula School District*,²⁷¹ for example, responding to the plaintiff's suggestion that schools be required to institute "virtual round-the-clock supervision," declared that

This would impose a financial burden which manifestly would impinge on the very educational purpose for which the school exists. . . . [A]t some point the obligation of the public entity to answer for the malfeasance or misfeasance of others, whether children or parents, reaches its outer limits. Public entities labor under budgetary constraints which peculiarly affect their obligation of care.²⁷²

Those who seek to make our schools safer cannot ignore the realities outlined in the *Commons Commission Report*. In fact, by acting to implement the recommendations of the commission, policy makers would be doing more to fight crime and drug abuse than any court could do by imposing additional legal obligations on school districts.²⁷³

At what point is there too much law? Current doctrines, statutes, and case law—properly enforced—already provide both the schools *and* the victims of crime with a wide array of rights and remedies. The interpretation of the Safe Schools Provision by the trial court in *Hosemann*²⁷⁴

personal income, California is tied with Florida for the *lowest pay in the nation*." *Id.* (emphasis added).

269. *Id.* at 43.

270. *Id.*

271. 83 Cal. App. 3d 492, 147 Cal. Rptr. 898 (1978).

272. *Id.* at 500, 147 Cal. Rptr. at 902 (citing *Wright v. Arcadia School Dist.*, 230 Cal. App. 2d 272, 278-80, 40 Cal. Rptr. 812, 816 (1964)).

273. Students who are better educated, more healthy mentally and physically, and equipped with a greater understanding of life itself are less likely to participate in violent, counterproductive acts.

See generally T. Sizer, *Horace's Compromise: The Dilemma of the American High School* (1985) (the first report from *A Study of High Schools*, co-sponsored by the National Association of Secondary School Principals and the Commission on Educational Issues of the National Association of Independent Schools).

274. See *supra* notes 208-217 and accompanying text.

will require more government involvement and more "intrusion" on the part of the courts at a time when we need less intrusion, fewer court orders, and a policy that would put a halt to the ever-growing number of legal disputes in our society.

School administrators need a less technical system. They are already faced with voluminous codes plus the most technical criminal procedure system in the world. They do not need yet another legal obligation with parameters and guidelines that may take many years and an endless number of court cases to unravel.

The courts of appeal and the supreme court should reject the *Hosemann* court's interpretation of article I, section 28(c). Imposing an affirmative duty to make schools safe regardless of cost would violate public policy, ignore clearly-established precedent, and, if interpreted literally, would require the schools to do something that is manifestly impossible. Such an additional legal obligation would only cause more problems . . . while solving none.

III. The Impact of Additional Duties and Increased Liability

Additional financial problems and more confusion regarding legal obligations are not the only likely consequences of an interpretation that provides for additional duties and increased school liability under article I, section 28(c). An affirmative duty under the Safe Schools Provision could give children the constitutional right to refuse to attend school.²⁷⁵ As the defendants argued in *People ex rel. George Deukmejian v. Los Angeles Unified School District*:²⁷⁶

If students and teachers of the [Los Angeles Unified School District] are, in fact, deprived of constitutional rights by being required to attend and remain in schools which are unsafe, then they are entitled to immediate relief and not the convoluted and attenuated relief sought by the petitioners. The only possible way to provide such immediate relief is to declare the invalidity of the Compulsory Education Law.²⁷⁷

The fear of liability, too, could cause an increase in the rate of expulsion, as schools seek to remove "problem" students who might injure

275. *Brosnahan v. Brown*, 32 Cal. 3d 236, 306 app., 651 P.2d 274, 320 app., 186 Cal. Rptr. 30, 76 app. (1982). Stanley M. Roden (District Attorney of Santa Barbara County), Richard L. Gilbert (District Attorney of Yolo County), and Terry Goggin (Chair of the State Assembly Committee on Criminal Justice) joined to write this and other arguments against Proposition 8, for the California Ballot Pamphlet (Primary Election, June 1982).

276. No. 64340 (Cal. Ct. App. 2d Dist., Jan. 25, 1983).

277. No. C323360, at 11 (Cal. Sup. Ct. Mar. 15, 1983) (Answer of Los Angeles County Respondents to Petition for Hearing).

others. Not only would this raise questions of due process²⁷⁸ but it may result in a conflict with California's fundamental right to an education.²⁷⁹

Retaining jurisdiction of the schools "to assure (that) the defendant . . . demonstrates . . . compliance,"²⁸⁰ as the courts did in the desegregation cases, may also result in more problems than it solves.²⁸¹ Such judicial tampering with the public schools has not been successful. Desegregation orders over the past thirty years have caused significant domestic turmoil, and often have resulted in public school systems that are even less effective in providing quality education than they once had been.²⁸²

Another possible consequence of increased liability is the implementation of additional security measures. The *Hosemann* court, in fact, points toward this alternative, when it says that "this new, inalienable, Constitutional right appears to impose an affirmative duty . . . to provide improved school security."²⁸³ Yet other California courts have already recognized some of the problems inherent in this approach. The court in *Rodriguez I*, for example, declared that "[t]he effectiveness of a security force is questionable, unless exceedingly large, and even then, the ability

278. For example, can "preventive" expulsion be constitutional?

279. *Serrano I*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

280. *Hosemann*, *supra* note 5, at 37. After granting declaratory relief [t]o assure the defendant school district demonstrates some compliance with Article I, Section 28(c), this court retains such jurisdiction as may be necessary, and defendant school district is ordered to appear before this court . . . and . . . inform this court of the specific steps it has taken to satisfy the mandate of Section 28(c).

Id.

281. The desegregation analogy is stressed by proponents of a liberal interpretation of section 28(c). Sawyer, *supra* note 17, at 1330-31. Author Kimberly Sawyer claims, in fact, that "the *strongest* support for imposing a duty on school districts to make their schools safe is found in school desegregation cases." *Id.* at 1330 (emphasis added). The author argues that "[i]f the courts may order a school district to take steps to alleviate segregation in the school system, the courts should also order the school district to take steps to alleviate crime and violence on school campuses." *Id.* at 1330-31. The analogy is also emphasized in a *Los Angeles Times* article on the *Hosemann* decision. *Judge Orders Oakland Schools to Find Way to Expel Campus Crime*, L.A. Times, May 13, 1986, § 1, at 3, col. 4. ("Bartalini suggested that courts may assume jurisdiction over the Oakland schools to ensure that they maintain security, much as judges adopt jurisdiction over schools to ensure compliance with desegregation orders." (emphasis added)).

282. See, e.g., J. LUKAS, *COMMON GROUND* (1985) (describing the multitude of problems faced by the Boston schools after desegregation was ordered); see also *Public Schools in Pasadena Achieve Gains as Strife Ends*, L.A. Times, June 8, 1986, § 1, at 3, col. 5 (describing the negative impact of the desegregation order and the positive direction the school system has been able to take since the federal court order was lifted in 1980).

283. *Hosemann*, *supra* note 5, at 31 (quoting Sawyer, *supra* note 17).

to guard against non-student criminal behavior is dubious."²⁸⁴

If the schools install metal detectors at gates and building entrances,²⁸⁵ fill the halls with a massive, armed security presence, and/or institute random searches of students who are "reasonably suspected" of carrying weapons and drugs,²⁸⁶ the result will undoubtedly be an atmosphere of acute paranoia, and an environment even less conducive to learning than now. Schools will be filled with tension and distrust. Complaints about "Big Brother"²⁸⁷ and the violation of students' fourth amendment rights will cause additional controversy and, undoubtedly, more litigation. Increased force might also have a boomerang effect: instead of suppressing crime, it might trigger even more violence and even more drug use among angry and rebellious students.²⁸⁸

Administrators might decide to introduce security measures only at certain schools, since, arguably, all schools do not need them. However, this decision could raise additional problems. If only some schools get stricter measures, complaints about unequal treatment could follow, both from schools that claim they need greater security and schools that claim they need less.²⁸⁹

Finally, all the controversy, publicity, and paranoia regarding "safety" could very well result in a new exodus of students from the public schools.²⁹⁰ In California today, this would only serve to widen the gulf between "the haves" and "the have-nots." Less contact between different segments of our society would mean less understanding and even less willingness to work together than we see now in the late 1980's.

284. 199 Cal. Rptr. 524, 529 (1984). See also *Bartell v. Palos Verdes Peninsula School Dist.*, 83 Cal. App. 3d 492, 500, 147 Cal. Rptr. 898, 902 (1978) (arguing against "virtual round-the-clock supervision or *prison-tight security*" (emphasis added)).

285. The installation of metal detectors was recommended by George Nicholson, co-author of Proposition 8, in a *Los Angeles Times* article on the *Hosemann* decision: "the solution may involve such tactics as the use of metal detectors outside school buildings . . ." *L.A. Times*, May 13, 1986, § 1, at 3 col. 4.

286. It should be noted that a logical extension (*reductio ad absurdum*) of the increased security approach would involve the searching of teachers and administrators. Airline employees, in fact, must now submit to searches at airports.

287. See G. ORWELL, 1984 (1949).

288. Innumerable sources are available to document the causes and effects of anger and rebellion among young people in the recent past. See, e.g., J. SINCLAIR, *GUITAR ARMY: STREET WRITINGS/PRISON WRITINGS* (1972); T. WOLFE, *THE ELECTRIC KOOL-AID ACID TEST* (1968).

289. One wonders what criteria a school district could use to determine which schools get increased security, and which schools do not. It is easy to envision anger among large segments of the community, and possible charges of racism.

290. See *supra* note 280.

Conclusion

Courts are now faced with the task of interpreting article I, section 28(c) of the California Constitution. A tireless group of Proposition 8 proponents and "school safety advocates" is leading the push in both the media and the courts for a determination that the Safe Schools Provision prescribes additional duties and increased liability. Politically, it appears difficult to disagree with this aggressive posture. After all, who is willing to go on record *against* safe schools?

A detailed analysis, however, of both the legal and practical implications of such an affirmative duty, leads to a different conclusion. An examination of relevant doctrines, statutes, and cases reveals two distinct theories of increased liability: additional duties/remedies under existing tort law (the position argued by the plaintiff in *Rodriguez II*), and an affirmative duty to make schools safe (the position taken by the trial court in *Hosemann*). The first position is out of step with both California case law and traditional tort principles. The second position not only ignores clearly established precedent, but is plainly violative of public policy. Both interpretations impose obligations on the schools that are at best unrealistic and at worst manifestly impossible.

On a practical level, the imposition of additional duties and increased liability is fraught with hidden dangers. Students and administrators, acting under the real or perceived pressures of this new mandate, could create conflicts with other state and federal constitutional provisions that would take years to unravel. The possible addition of increased security measures could easily result in anger, tension, the "boomerang effect" of more violence and drug use, and a school atmosphere that is even less conducive to learning than now.

This Article has demonstrated that there are, in fact, three reasonable alternatives for the courts to adopt in interpreting the Safe Schools Provision. Under one interpretation, the courts would hold that the Safe Schools Provision is nothing more than a restatement of existing law, from which no additional rights can be derived. Under a second interpretation, the courts would find that article I, section 28(c) is not self-executing, and that the legislature must define the specific acts that would be prohibited and/or the specific acts that would be required. Under a third interpretation, the courts would rule that the Safe Schools Provision, as part of the Victims' Bill of Rights, simply makes it easier to prosecute those who commit crimes on school grounds by allowing fewer procedural rights and safeguards to suspects in a school setting.

From both a legal and a practical perspective, then, it is possible to disagree with those who would impose additional duties and increased

liability on the schools. It is possible to take this position both intellectually and politically and not be considered "against safe schools." There are better ways to make the California schools more safe, secure, and peaceful than to hold that a nebulous constitutional provision can or should be a vehicle for change. The public schools in California are shaped by complicated forces that are, ultimately, only a reflection of society as a whole. Although simple solutions might be attractive at first glance, a detailed analysis reveals that a long-range plan for improving our entire educational system will undoubtedly be more effective in creating a school environment where both students and teachers can be happier and more productive.